WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GRACE NUNES, *Applicant*

vs.

STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES; administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ8210063; ADJ8621818
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks removal, or in the alternative, reconsideration of the November 27, 2024 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that in ADJ8210063, applicant, while employed as a field representative on September 13, 2011, sustained industrial injury to her neck and left shoulder. The WCJ further found that in ADJ8621818, applicant, while employed as a field representative from September 13, 2010 to September 13, 2011, sustained injury to her bilateral upper extremities. The WCJ ordered the parties to provide the Qualified Medical Evaluator (QME) and the two reporting vocational experts with copies of our two prior en banc decisions in this matter, and to request supplemental reporting. The WCJ further ordered the parties to provide the QME with any additional medical records adduced since the QME's last report.

Applicant contends that the WCJ's order for additional discovery will result in prejudicial delay in resolving her claim.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Removal, or in the alternative, Petition for Reconsideration (Report), recommending that insofar as the petition seeks removal, that it be denied or dismissed, and insofar as the petition seeks reconsideration, that the petition be denied.

We have considered the Petition for Removal or 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

In the cases before us, applicant sustained two admitted industrial injuries while employed by defendant. In ADJ8210063, applicant sustained injury to her neck, upper extremities, and left shoulder on September 13, 2011 while employed as a field representative by the California Department of Motor Vehicles. In ADJ8621818, applicant sustained injury to her bilateral upper extremities from September 13, 2010 to September 13, 2011 while similarly employed.

The parties selected Melinda Brown, M.D., to act as the qualified medical evaluator (QME) in orthopedic medicine. The parties have also retained vocational experts, with Gene Gonzales reporting for the applicant and Steven Koobatian, Ph.D., reporting for defendant.

On February 21, 2023, the WCJ issued a decision awarding unapportioned permanent and total disability. The WCJ based the award on the reporting of applicant's vocational expert Mr. Gonzales, who determined that applicant was not amenable to vocational retraining and was therefore permanently and totally disabled. Mr. Gonzales further opined that after the application of principles of "vocational apportionment," applicant's disability was wholly industrial.

On March 17, 2023, defendant sought reconsideration of the award.

On May 16, 2023, we granted reconsideration to further study the factual and legal issues in the case.

On June 22, 2024, we issued our en banc decision 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*). Therein, we held that Labor Code[1] 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."

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

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

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.)

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*.)

Applicant filed a Petition for Reconsideration of our en banc decision, and on August 29, 2023, we issued our decision *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. P.D. LEXIS 46] (Appeals Board en banc) (*Nunes II*). Therein, we held that the validity of an apportionment analysis described by an evaluating physician is "not assumed and must be carefully weighed and determined by the WCJ." (*Id.* at p. 897.) We provided various examples of when an applicant might be entitled to an unapportioned award based on vocational evidence, such as when "the WCJ determines that no evaluating

physician has identified valid legal apportionment," or when "the evaluating physician has carefully considered factors of apportionment, but has nonetheless determined that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability." (*Id.* at p. 898.) However, "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 p. 899.) Accordingly, we affirmed our decision in *Nunes I* that the vocational reporting in evidence did not meet the minimum standards necessary to be considered substantial vocational reporting, and that principles of due process required development of the record.

On September 4, 2024, the parties proceeded to trial "to retry the issues given due consideration to the Board's decision to the effect that we cannot apply vocational apportionment as it is not supported by legal standards." (Minutes of Hearing, dated September 4, 2024, at p. 2:11.) The parties submitted additional written arguments but no new documents or testimonial evidence. (*Id.* at p. 2:13.) The WCJ ordered the matter submitted for decision the same day.

On November 27, 2024, the WCJ issued the F&O, ordering in relevant part that the parties provide QME Dr. Brown with a copy of the June 22, 2024 and August 29, 2024 WCAB en banc decisions and any medical records generated since Dr. Brown's last reporting. (Order No. 1.) The WCJ further ordered the two en banc decisions be submitted to both reporting vocational experts. (Order Nos. 2 & 3.) The WCJ's Opinion on Decision explained that "[h]aving ruled that vocational apportionment has no basis in the law, and considering that both vocational experts issued opinions to the effect that applicant was totally disabled, but commenting on the notion of impermissible vocational apportionment it is Incumbent upon this Court to seek additional opinion from the vocational experts in accordance with the correct standard held by the Board." (Opinion on Decision, at p. 6.)

Applicant's Petition contends that the WCJ's order for development of the record will delay a final decision in this case for months or years, resulting in significant prejudice to applicant. Applicant asserts "the WCJ cannot rely on the vocational apportionment analysis by Mr. Gonzales, but must analyze if the medical apportionment determination made by Dr. Brown is legally valid medical apportionment." (Petition, at p. 4:19.) In the alternative, applicant contends that the F&O

does not adequately explain the WCJ's rationale for reopening discovery, and that we should vacate the F&O as a result.

Defendant's Answer responds that the WCJ did not abuse his discretion by ordering the parties to obtain supplemental reporting from the QME and the vocational experts because our en banc decisions in *Nunes I* and *II* "ordered for the matter returned 'to the trial level for further proceedings and decisions by the WCJ as may be required, consistent with this opinion.'" (Answer, at p. 4:13.)

The WCJ's Report states that his decision to develop the record followed the Board's suggestion that the parties seek further clarification from the QME on the issue of medical apportionment. The WCJ also noted that additional reporting was necessary from the vocational experts in light of our determination that vocational apportionment is incompatible with section 4663.

DISCUSSION

I.

Former 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.
>
> (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 Management 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 January 2, 2025, and 60 days from the date of transmission is March 3, 2025. This decision is issued by or on March 3, 2025, 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 January 2, 2025, and the case was transmitted to the Appeals Board on January 2, 2025. 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 January 2, 2025.

II.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" *(Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not

include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes findings of employment, injury, and need for future medical care. These are final orders subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].)

Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding/order regarding development of the record with the QME and with the parties' respective vocational experts. Therefore, we will apply the removal standard to our review. (See *Gaona, supra,* 5 Cal.App.5th 658, 662.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

In *Nunes I*, we held that "factors of apportionment must be carefully considered, even in cases where an injured worker is permanently and totally disabled as a result of an inability to participate in vocational retraining," and that "[e]xpert vocational testimony may be utilized to identify and distinguish industrial and nonindustrial vocational factors, but may not substitute impermissible 'vocational apportionment' in place of otherwise valid medical apportionment." (*Nunes I*, at p. 756.) We also observed that "an unapportioned award may be appropriate where it can be established through competent medical and/or vocational evidence that the current

industrial injury is the sole causative factor for the employee's residual permanent disability." (*Ibid*.)

Here, the WCJ has considered the arguments advanced by the parties in briefing responsive to the issues of apportionment and the sufficiency of the record. Following his review of the record, the WCJ has concluded that further development of the record is necessary, including additional reporting from both the QME and the parties' respective vocational experts. The WCJ writes:

> For this Court to have issued another Findings and Award utilizing the same evidence previously submitted, but expanding said decision in efforts to comply with Labor Code Sec 5313 would have left the parties in the same position as they were when the case was originally submitted. Such does not appear to be what the Board intended. The QME needs to address legal apportionment as the Board has clarified, and the vocational experts need to issue opinions consistent with the Board's clarification that there is no legal basis for vocational apportionment.

(Report, at p. 3.)

It is well established that any award, order, or decision of the Board be supported by substantial evidence in the light of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Accordingly, our inquiry cannot rely solely on isolated evidence which supports a particular conclusion. Our review must include all "other relevant facts of record which rebut or explain that evidence." (*Lamb, supra*, at p. 281.)

In addition, the law has long recognized that where the WCAB cannot reach a just and reasoned decision on the existing record because the evidence is insufficient, unclear or conflicting, the WCAB has the power and even the duty to further develop the record under sections 5701 and 5906. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264].)

Here, and following our independent review of the record occasioned by applicant's Petition, we are not persuaded that the WCJ erred in determining that the record must be developed. The WCJ's analysis appropriately considers whether he can reach a just and reasoned decision on the current record and concludes that development under section 5701 is appropriate. The WCJ

correctly notes that he must initially determine whether there is valid medical apportionment identified by the evaluating physician under section 4663, and if so, whether the vocational experts have appropriately accounted for that apportionment in their respective analyses of feasibility for vocational retraining pursuant to *Ogilvie, supra,* 197 Cal.App.4th 1262. The WCJ concludes that additional analysis will be required from both the evaluating medical-legal physician and the vocational experts before their reporting will constitute substantial evidence and conform to the analysis required under section 4663.

We also note that the WCJ is vested with broad discretion in resolving discovery disputes, and we discern no abuse of that discretion in the instant matter. (Cal. Code Regs., tit. 8, § 10955(a); *Holz v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 484 [2013 Cal. Wrk. Comp. LEXIS 74] (writ. den.); *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406]; *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624].)

Accordingly, we are not persuaded that applicant has established either undue prejudice or irreparable harm resulting from the F&O. (Cal. Code Regs., tit. 8, § 10955(a).) Applying the removal standard to this hybrid decision, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSE H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 27, 2025

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

GRACE NUNES
GROVE LAW FIRM
STATE COMPENSATION INSURANCE FUND

SAR/bp

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