WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDREW REGALADO, *Applicant*

vs.

POULOS MOVING SYSTEMS & SECURITY NATIONAL INSURANCE COMPANY, administered by AMTRUST, *Defendants*

Adjudication Number: ADJ9885344
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the April 4, 2025 Findings, Award, and Orders (FA&O), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant, while employed as a furniture mover by defendant on November 7, 2014, sustained injury arising out of and in the course of employment (AOE/COE) to the lumbar spine, psyche, and erectile dysfunction and sustained 100% permanent total disability with no "factual basis for apportionment." (FA&O, pp. 1-2.) The WCJ therefore awarded applicant permanent total disability indemnity commencing November 8, 2014, payable at applicant's temporary total disability rate of $354.31 weekly, subject to annual state average weekly wage (SAWW) increases. (*Id*. at p. 2.)

Defendant contends that the WCJ's finding of 100% permanent total disability and corresponding award is not supported by the totality of evidence since applicant's testimony "related to his use of a cane and walker during his daily life" was not reported to medical-legal evaluators or vocational experts. (Petition, pp. 3-4) Defendant further contends that applicant's felony conviction is a "non-industrial factor" affecting applicant's "access to the open labor market" and as such, the case should be analyzed on "whether the [a]pplicant should have even been able to rebut under *Leboeuf*." (*Id*. at p. 5.)

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

We have considered the Petition, 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 the Petition.

FACTS

Applicant claimed that, while employed by defendant as a furniture mover on November 7, 2014, he sustained injury AOE/COE to the lumbar spine, psyche, and erectile dysfunction.

Applicant sought and received treatment from orthopedic spine surgeon, Dr. Mark Howard of Pinnacle Healthcare, and pain management specialists, Drs. William Brose and Robert Cluff of the HELP Pain Medical Network.

Thereafter, the parties proceeded with discovery and retained physical medicine and rehabilitation (PMR) PQME, Dr. Melinda Brown, psychiatric PQME, Dr. Alberto Lopez, and urology Agreed Medical Evaluator (AME), Dr. Fred Kuyt.

Dr. Lopez evaluated applicant on September 21, 2021, issued a supplemental report on December 1, 2021, and completed a reevaluation on May 17, 2022 wherein he opined that applicant's industrial psyche injury was permanent and stationary with a GAF score of 54. (Exhibit J2, p. 12.) He noted that 25% of the disability was due to non-industrial factors. (*Id*. at p. 15.) He did not provide any work restrictions on a psychiatric basis. (*Ibid*.) In a June 22, 2022 supplemental, Dr. Lopez opined that there is synergistic effect between applicant's orthopedic and psychiatric injuries and the disabilities should be added rather than combined. (Exhibit J1, p 2.)

Dr. Kuyt evaluated applicant on April 12, 2022, and diagnosed him with erectile dysfunction as a compensable consequence of the lumbar injury. (Exhibit J5, p. 14.) He opined that applicant's condition was permanent and stationary with a resulting 12% whole person impairment. (Id. at pp. 14-15.) Work restrictions were not recommended. (*Id*. at p. 14.)

Dr. Brown evaluated applicant on June 21, 2016, and conducted a reevaluation on July 20, 2020. She issued numerous supplemental reports dated August 4, 2016, November 11, 2016, August 9, 2018, October 13, 2018, January 11, 2019, November 17, 2020, January 25, 2022, and March 23, 2022. Dr. Brown was deposed on April 25, 2024.

In her August 4, 2016 report, Dr. Brown reiterated that applicant's lumbar injury was industrial and opined that applicant's condition was permanent and stationary with a resulting 23% whole person impairment under the DRE method with a 3% add-on for pain. (Exhibit J16, pp. 1-2.) Non-industrial apportionment was not indicated. (Exhibit J16, p. 2.) Her findings were updated after a July 20, 2020 reevaluation wherein she noted that applicant's lumbar impairment had increased to 33% through worsening and application of the ROM method. (Exhibit J10, pp. 24-26.) Dr. Brown removed the pain add-on as pain was taken into account in the ROM method. (Exhibit J10, p. 24.) She also added a 2% whole person impairment due to effects of medications, 2% for constipation, and 15% for deconditioning and fatigue leading to significant loss of functional abilities. (Id. at pp. 24-25.) She noted also that due to applicant's pain and decreased functioning, he would not be able to sustain part-time or full-time work. (Id. at pp. 27-28.) She noted his efforts and abilities would not be consistent enough to make him employable and his condition was not conducive to a scheduled day considering the severity of restrictions already imposed. (Id. at p. 28.) In a January 25, 2022 report, Dr. Brown confirmed that applicant was totally disabled due to functional and mobility losses. (Exhibit J9, p. 3.)

Upon receipt of Dr. Brown's above findings, the parties procured vocational experts. Scott Simon was retained as applicant's vocational expert and Frank Diaz as defendant's vocational expert.

Mr. Simon completed an initial evaluation on September 28, 2018 and issued supplemental reports dated March 5, 2019, June 23, 2022, and July 10, 2024. Mr. Simon was deposed on November 5, 2019.

In his September 28, 2018 report, Mr. Simon concluded that based upon applicant's industrial injury to the lumbar spine and resulting severe pain, applicant is not amenable to rehabilitation or able to sustain employment in the open labor market. (Exhibit A4, pp. 18-19.) In his June 23, 2022 supplemental report, he further concluded that due to worsening symptoms, including additional limitations from urological and psychiatric issues, it is "unimaginable" that applicant would be able to navigate back into the work force. (Exhibit A2, p. 4.) He concluded that applicant would not be able to participate in the most rudimentary work assignments even on a part-time basis. (*Ibid*.)

In her supplemental report dated October 13, 2018, Dr. Brown reviewed vocational reporting from Mr. Simon and agreed that applicant is "not employable in the open labor market"

or "amenable to employment" due to applicant's pain levels and "his scoring on vocational testing and cognition." (Exhibit J13, p. 3.)

Mr. Diaz completed an initial evaluation November 27, 2018 and issued supplemental reports dated December 8, 2022 and January 23, 2025. In his November 27, 2018 report, Mr. Diaz indicated that applicant retains the capacity to return to work in the open labor market and is amenable to rehabilitation through a work hardening method such as that employed at Hartnell College through vocational retraining or through on the job training by a "benevolent employer" who would allow him to work on a part-time basis and gradually increase his hours until he is able to reach full-time status. (Exhibit D1, pp. 3-4.) He noted also that applicant sustained a 10% loss of the labor market due to his felony conviction. (Id. at p. 4.)

In a January 23, 2025 report, Mr. Diaz reiterated that "through a combination of [w]ork [c]onditioning, [w]ork [h]ardening, and the myriad of accommodations available[,]" applicant would be able to return to "select [s]edentary positions on a part-time basis with the goal of increasing his stamina to return to full-time employment in the open labor market." (Exhibit D3, p. 7.)

On March 13, 2025, the matter proceeded to trial on the issues of permanent and stationary date; permanent disability; apportionment; need for future medical; a child support lien held by Monterey County; attorney's fees; whether the psyche injury is an injury AOE/COE or a compensable consequence injury; and whether "total disability is applicable under *Leboeuf* and/or Labor Code section 4664." (Minutes of Hearing, March 13, 2025, pp. 2-3.)

On April 4, 2025, the WCJ issued a FA&O which held, in relevant part, that applicant, while employed as a furniture mover by defendant on November 7, 2014, sustained injury AOE/COE to the lumbar spine, psyche, and erectile dysfunction and sustained 100% permanent total disability with no non-industrial apportionment. (FA&O, pp. 1-2.) Thus, applicant was awarded permanent total disability indemnity commencing November 8, 2014, at applicant's temporary total disability rate of $354.31 weekly, subject to annual SAWW increases. (*Id*. at p. 2.)

DISCUSSION

I.

Preliminarily, 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.
>
> (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 under the Events tab 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 May 7, 2025, and 60 days from the date of transmission is July 6, 2025, which is a Sunday. The next business day that is 60 days from the date of transmission is Monday, July 7, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision was issued by or on July 7, 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

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[1] All further statutory references will be to the Labor Code unless otherwise indicated.

[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.

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 shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on May 7, 2025, and the case was transmitted to the Appeals Board on May 7, 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 May 7, 2025.

II.

Turning now to the merits of the Petition, defendant contends that the WCJ's finding of 100% permanent total disability and the corresponding award is not supported by the totality of evidence since applicant's testimony "related to his use of a cane and walker during his daily life" was not reported to medical-legal evaluators or vocational experts. (Petition, pp. 3-4)

As explained in *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Further, it is well established that vocational evidence may be used to address issues relevant to the determination of permanent disability. While the Permanent Disability Rating Schedule (PDRS) is presumptively correct (see *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808, 826 [75 Cal.Comp.Cases 837]), "a rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning

capacity is greater than that reflected in the PDRS." (*Nunes v. State of California, Dept. of Motor Vehicles* (*Nunes I*) (2023) 88 Cal.Comp.Cases 741, 749 (Appeals Board en banc).) Among the methods described for challenging a rating obtained under the PDRS is 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].) 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." (*Nunes I*, *supra*, at p. 751.)

Here, the WCJ concluded that the opinions of applicant's vocational expert, Scott Simon, were "more persuasive" (FA&O and OOD, p. 13.) given that defendant's vocational expert, Frank Diaz, made speculative findings regarding applicant's ability to return to the labor market by opining that applicant could attempt a work hardening program and thereby return to sedentary work on a part-time basis with the ultimate goal of increasing his stamina so that he might return to work full-time. (FA&O and OOD, p. 13; Exhibit D-1, p. 42.) He recommended that applicant obtain vocational retraining through Hartnell College or seek a "benevolent employer" who would be willing to provide on-the-job training and extensive accommodations. (Exhibit D-1, p. 42.) Notwithstanding the hurdles involved in the securing training either through Hartnell or with a "benevolent employer," we agree with the WCJ that the anticipated success of a work hardening program is speculative at best, particularly given applicant's increasing pain levels and diminishing physical and cognitive abilities. (FA&O and OOD, pp. 13-14.)

In contrast, Mr. Simon concluded that based upon applicant's industrial injury to the lumbar spine and resulting pain, applicant is not amenable to rehabilitation. (Exhibit A4, pp. 18-19.) He further noted that due to worsening, applicant would be unable to participate in the most rudimentary work assignments even on a part-time basis (Exhibit A2, p. 4.) These findings were corroborated by orthopedic PQME, Dr. Brown, who confirmed that applicant was totally disabled due to functional and mobility losses. (Exhibit J9, p. 3.) Considering the extent of these limitations, she noted that his condition was not conducive to a scheduled day. (Exhibit J10, p. 28.)

Based upon our review of the evidentiary record, including the vocational reports in this matter, we conclude that Mr. Simon's opinions are substantial evidence and that applicant has successfully rebutted the PDRS. Mr. Simon completed a full assessment, took a detailed history, and provided evidence and reasoning in support of his conclusions. (Exhibit A4, pp. 18-19.) We do not believe that the inclusion of information "related to [applicant's] use of a cane and walker during his daily life" would be dispositive, particularly given the weight of the evidence in this matter.

III.

Defendant further contends that applicant's felony conviction is a "non-industrial factor" affecting applicant's "access to the open labor market" and as such, the case should be analyzed on "whether the [a]pplicant should have even been able to rebut under *Leboeuf*." (*Id*. at p. 5.) As noted above, in his November 27, 2018 report, Mr. Diaz provided vocational apportionment consisting of a 10% loss of the labor market due to applicant's felony conviction. (Exhibit D1, p. 4.)

It is well established, however, that vocational apportionment is invalid, and that vocational experts must consider valid medical apportionment found by the reporting physicians. This is confirmed in *Nunes I*, wherein we held that vocational evidence must address apportionment, but such evidence "may not substitute impermissible 'vocational apportionment' in place of otherwise valid medical apportionment." (*Nunes I*, *supra*, at p. 756.) 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. (*Ibid*.) 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*.) We subsequently re-affirmed these principles in *Nunes v. State of California, Dept. of Motor Vehicles* (*Nunes II*) (2023) 88 Cal.Comp.Cases 894 (Appeals Board en banc).

Based upon the foregoing, we conclude that Mr. Diaz's findings on vocational apportionment are invalid.

IV.

Accordingly, defendant's Petition for Reconsideration is denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the April 4, 2025 Findings, Award, and Orders is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 7, 2025

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

ANDREW REGALADO
WILSON & WISLER
HANNA, BROPHY, MacLEAN, McALEER & JENSEN

RL/*cs*

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