WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANTONIO ZAMORA, *Applicant*

vs.

AT&T COMMUNICATIONS;
OLD REPUBLIC INSURANCE, administered by SEDGWICK CMS., *Defendants*

Adjudication Numbers: ADJ10528292; ADJ12975722 (MF)
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the May 15, 2025 Joint Findings and Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained new and further disability to the right hip, hypertension, and diabetes as a result of a cumulative injury during the period from May 13, 2015 through May 13, 2016 (ADJ12975722) which resulted in an increase in permanent disability from 57% to 70%. (F&A, p. 2.) The WCJ also found that applicant sustained a new injury arising out of and in the course of employment (AOE/COE) on February 4, 2020 (ADJ10528292) to the right shoulder resulting in a separate 28% permanent disability.

Defendant contends that with respect to the increased impairment for the orthopedic body parts in the cumulative injury, the WCJ's reliance on the findings of replacement orthopedic Agreed Medical Evaluator (AME), Dr. David Heskiaoff, is misplaced and that the apportionment findings of prior orthopedic AME, Dr. Jeffrey Berman, should be considered. Defendant also contends that the increased impairment for applicant's internal claims of hypertension and diabetes should be attributed to the February 4, 2020 injury rather than the cumulative injury, based upon reporting from internal panel Qualified Medical Evaluator (PQME), Dr. Stewart Lonky.

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 premise technician during the period from May 13, 2015 through May 13, 2016 (ADJ12975722), he sustained injury AOE/COE to the lumbar spine, shoulders, lower extremities, and other body systems.

The parties proceeded with discovery and retained orthopedic AME, Dr. Berman, and internal PQME, Dr. Lonky, as medical-legal experts.

On August 3, 2017, applicant was evaluated by Dr. Berman. In his corresponding report, Dr. Berman opined that applicant sustained 6% whole person impairment (WPI) to the lumbar spine, 3% WPI to the left shoulder, 15% WPI to the right hip, and 4% WPI for pain due to ongoing right shoulder issues. (Applicant Exhibit 9, pp. 14-15.) For the lumbar spine and right hip, he apportioned 10% to nonindustrial factors. (*Id*. at p. 16.)

Internal PQME, Dr. Lonky, evaluated applicant on June 4, 2018 and October 11, 2018 with corresponding reports issuing thereafter, including a supplemental report dated September 20, 2019. With respect to applicant's hypertension, Dr. Lonky opined that applicant sustained 35% WPI with 50% apportionment to nonindustrial factors due to applicant's "longstanding history of hypertension and the development of hypertensive cardiomyopathy" and 50% apportionment "to the intense emotional stress that [applicant] experienced during the course of his employment at AT&T and as a result of injuries that occurred during that employment." (Applicant Exhibit 6, p. 3; PQME report of Stewart Lonky, M.D., September 10, 2019, p. 27.)[1] With respect to applicant's diabetes, Dr. Lonky found that applicant sustained 6% WPI with 40% apportionment to obesity, poor dietary control, and lack of physical activity, and 60% apportionment to "factors associated with the high degree of stress that [applicant] developed as a result of his orthopedic pain and injuries, and abnormalities in glucose metabolism that have subsequently taken place." (PQME report of Stewart Lonky, M.D., September 10, 2019, p. 26.)

Ultimately, the parties agreed to settle the cumulative injury claim via Stipulations with Request for Award based upon a 57% permanent disability per the above reports of Drs. Berman

[1] Dr. Lonky's September 20, 2019 report was filed in support of the Stipulations with Request for Award approved on February 245, 2020, and as such, is part of the record of proceedings. (Cal. Code Regs., tit. 8 § 10803 (b).)

and Lonky. (Stipulations with Request for Award, p. 7.) The settlement included the left shoulder, right hip, lumbar spine, hypertension, and diabetes, and was approved by the WCJ on February 24, 2020.

Shortly prior to settlement of the cumulative injury claim, applicant filed a new claim for a February 4, 2020 (ADJ10528292) specific injury to the shoulders and other body systems.

Thereafter, on November 17, 2020, applicant filed a Petition to Reopen for New and Further Injury (Petition to Reopen) in the cumulative injury claim (ADJ12975722).

Dr. Berman was replaced by new orthopedic AME, Dr. David Heskiaoff. Dr. Heskiaoff evaluated applicant on July 24, 2020, February 23, 2021, and March 3, 2022.

In his March 3, 2022 report, Dr. Heskiaoff opined that applicant sustained injury AOE/COE to his right shoulder as a result of the February 4, 2020 injury and experienced a "flare-up and worsening of his right hip condition due to the continuous trauma of work from May 13, 2015 through May 13, 2016." (Joint Exhibit BB, p. 15.) Applicant reached permanent and stationary (P&S) status for the right shoulder and hip as of March 3, 2022 with 14% WPI to the right shoulder and 15% WPI to the right hip. (*Id*. at p. 16.) For the right shoulder, Dr. Heskiaoff apportioned "10% of patient's disability to the degenerative changes and 90% to the injury of February 4, 2020." (*Ibid*.) No other apportionment findings were indicated.

On April 3, 2023, applicant was reevaluated by Dr. Lonky. He issued a corresponding report as well as supplemental reports dated October 26, 2023, December 21, 2023, and October 11, 2024.

In his October 26, 2023 report, Dr. Lonky found that applicant's hypertension worsened, increasing from 35% to 40% WPI, with apportionment divided 50% to nonindustrial factors including "obesity, dietary habits, and lack of exercise" and 50% to "industrial events" and a "combination of his injuries." (Applicant Exhibit 3, p. 10.) In a subsequent October 11, 2024 report, he opined that "50% of the disability related to [applicant's] hypertension is secondary to his prior injury, and 50% is secondary to the new injury." (Applicant Exhibit 1, p. 3.)

In his December 21, 2023 and October 11, 2024 reports, Dr. Lonky opined that the "2020 injury increased [applicant's diabetes] impairment from the previous 6% level to the level of 8%" with apportionment divided 40% "to non-industrial factors including obesity" and 60% "to the emotional stress, as well as the unrelenting pain from his orthopedic injuries." (Applicant Exhibit 1, p. 2-3; Applicant Exhibit 2, p. 10.)

On February 25, 2025, both claims proceeded to trial on the issues of permanent disability, apportionment, need for further medical treatment, liability for self-procured medical treatment, and attorney's fees.

On May 15, 2025, the WCJ issued a F&A which held that, with respect to the cumulative injury, applicant sustained new and further disability to the right hip, hypertension, and diabetes, resulting in an increase in permanent disability from 57% to 70%. (F&A, p. 2.) The WCJ also found that applicant sustained a new injury AOE/COE on February 4, 2020 to the right shoulder, resulting in a separate 28% permanent disability.

DISCUSSION

I.

Preliminarily, former Labor Code[2] 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."

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

Here, according to Events, the case was transmitted to the Appeals Board on July 9, 2025, and 60 days from the date of transmission is September 7, 2025, which is a Sunday. The next business day that is 60 days from the date of transmission is Monday, September 8, 2025**.** (See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision was issued by or on September 8, 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 constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on July 9, 2025, and the case was transmitted to the Appeals Board on July 9, 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 July 9, 2025.

II.

Turning now to the merits of the Petition, defendant contends that the WCJ's reliance on the findings of replacement orthopedic AME, Dr. Heskiaoff, is misplaced and that the apportionment findings of prior orthopedic AME, Dr. Jeffrey Berman, should be considered.

It is well established that the WCJ has the authority to evaluate each report admitted into evidence on its own merits and to determine whether each report constitutes substantial medical evidence. Further, a WCJ is empowered to choose among conflicting medical reports and may rely upon that which they deem most persuasive, provided that the opinion is substantial evidence. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 [33 Cal.Comp.Cases 221]; *Lamb*

[3] 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.

v. Workers' Comp. Appeals Bd. (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *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.) Pursuant to *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th922, 928 [71 Cal.Comp.Cases 1687], "[a] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations.) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citation.)" "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation.)" (*Kyle v. Workers' Comp. Appeals Bd* (*City and County of San Francisco*) (1987) 195 Cal.App.3d 614, 621.)

Based upon our review of the evidentiary record, we find that Dr. Heskiaoff provided adequate reasoning in reaching his opinions and relied upon relevant facts and history, including thorough examinations of the applicant and a detailed analysis of various medical records. As such, the reports of Dr. Heskiaoff, including his March 3, 2022 report, are substantial medical evidence. Accordingly, we agree with the WCJ's decision to rely upon the findings of Dr. Heskiaoff over those of prior orthopedic AME, Dr. Berman.

III.

Defendant further contends that based upon reporting from internal PQME, Dr. Lonky, increased impairment for applicant's hypertension and diabetes should be attributed to the February 4, 2020 injury (ADJ10528292) rather than the cumulative injury of May 13, 2015 through May 13, 2016 (ADJ12975722).

It is well established that defendant carries the burden of proof on the issue of apportionment. (Lab. Code, § 5705; *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v.Workers' Comp. Appeals Bd.*

(2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Bd. en banc).) To meet this burden, defendant "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, *supra*, at p. 620.)

Further, "[a]pportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay*, *supra*, at p. 564.) The WCJ has the authority to determine the appropriate amount of apportionment, if any. However, as noted above, any decision issued by a WCJ must be based upon substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb*, *supra*, at p. 274; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque*, *supra*, at *p.* 627.)

In *Escobedo*, the Appeals Board outlined the following requirements for substantial evidence on the issue of apportionment:

> "[I]n the context of apportionment determinations, the medical opinion 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, so that the Board can determine whether the physician is properly apportioning under correct legal principles. (citations.)
>
> Thus, to 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."

(*Escobedo*, *supra*, at p. 621.)

Here, applicant's hypertension and diabetes claims were originally stipulated by the parties as conditions stemming from the cumulative injury claim, as per the findings of internal PQME, Dr. Lonky, in his September 20, 2019 report. Shortly thereafter, applicant filed a new claim for a February 4, 2020 specific injury to the shoulders and "other body systems." (Application for Adjudication of Claim, February 12, 2020, p. 4.) This was followed by applicant's filing of a Petition for New and Further Injury in the cumulative injury claim. Applicant was then reevaluated by Dr. Lonky who found that with respect to applicant's hypertension, applicant sustained an increase in impairment from 35% to 40% with apportionment divided 50% to nonindustrial factors

including "obesity, dietary habits, and lack of exercise" and the remaining 50% to "industrial events" and "the combination of his injuries." (Applicant Exhibit 3, p. 10.) Unfortunately, clarification regarding which "industrial events" and "injuries" were being referenced was not provided. On October 11, 2024, nearly a year after applicant's reevaluation, Dr. Lonky issued a supplemental report wherein he found that "50% of the disability related to this hypertension [was] secondary to his prior injury, and 50% [was] secondary to the new injury." (Applicant Exhibit 1, p. 3.) Based upon this new report, it was unclear whether Dr. Lonky intended to fully supplant his October 26, 2023 apportionment findings or simply replace his non-industrial apportionment findings with a 50/50 split between the two injuries.

Similarly, with respect to applicant's diabetes, Dr. Lonky opined that applicant sustained an increase in impairment from 6% to 8% with 40% apportionment "to non-industrial factors including obesity" and 60% apportionment to "the emotional stress" and "unrelenting pain from his orthopedic injuries." (Applicant Exhibit 1, pp. 2-3; Applicant Exhibit 2, p. 10.) Once again, Dr. Lonky failed to provide specifics regarding which "orthopedic injuries" were being referenced and how apportionment was to be divided amongst them.

As noted above, a medical opinion proffered as substantial evidence must set forth reasoning in support of its conclusions and not be speculative. (*Gatten*, *supra*, at pp. 922, 928; *Escobedo*, *supra*, at p. 604.) Given the lack of specificity, lack of reasoning, and confusion surrounding Dr. Lonky's apportionment findings, we conclude that his opinions on apportionment are not written in accordance with the requirements outlined in *Escobedo* and *Gatten* and defendant therefore failed to meet their burden of proof with respect to apportionment of internal permanent disability to the specific injury of February 4, 2020. Accordingly, we agree with the WCJ's decision to allocate the increased impairment from applicant's claims of diabetes and hypertension to the cumulative injury, as per the original Stipulations with Request for Award.

Accordingly, defendant's Petition is denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the May 15, 2025 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 5, 2025

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

ANTONIO ZAMORA
GLAUBER BERENSON VEGO
COLEMAN CHAVEZ & ASSOCIATES

RL/*cs*

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