WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CYNTHIA HARGERTY, *Applicant*

vs.

HEALTHNET, INC.; SAFETY NATIONAL INSURANCE, administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ9477887
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petitions for Reconsideration of the Findings and Order (F&O) issued on December 23, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant failed to meet her burden of proof to rebut the scheduled rating and ordered that applicant take nothing further on her petition to reopen.

Applicant contends, in pertinent part, that the WCJ erred in relying upon a prior finding of fact that applicant's psychological permanent disability is not compensable pursuant to Labor Code[1] section 4660.1(c) and that applicant proved she was permanently and totally disabled pursuant to vocational reporting.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsiderations, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, and for the reasons stated in the WCJ's Report, as our Decision After Reconsideration we will affirm the December 23, 2021 F&O.

---

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

I.

FACTS

Per the WCJ's Report:

Applicant Cynthia Hargerty was employed as a substance abuse counselor for defendant Health Net Inc. when she sustained injury on 04-01-2013 to her right hip, back, and psyche as the result of a slip and fall accident. Originally, applicant settled her case by way of Stipulations with Award on 01-08-2018 for 27% permanent disability after apportionment based on orthopedic body parts based on the reports of QME Dr. William Campbell. The settlement of 01-18-2018 also included psychiatric injury and the QME for psychiatric issues is Dr. John Parke. The settlement of 01-18-2018 did not include any permanent disability rating attributed to psychiatric injury.

Applicant filed a petition to reopen her case and the parties engaged in further discovery. Findings, Award and Order with Opinion on Decision issued on 03-30-2020 wherein it was determined that applicant did not suffer new and further disability subsequent to Stipulations with Award of 01-08-2018 for 27% permanent disability for injury to her orthopedic body parts. (Finding of Fact number 4 in Findings, Award and Order with Opinion on Decision dated 03-30-2020, or "F&A 03-30-2020.") After full analysis of the mechanism of injury and the onset of psychiatric condition, it was found that psychiatric injury is a compensable consequence and Labor Code section 4660.1(c) bars add-on disability for her psychiatric injury. (Finding of Fact number 6 in F&A 03-30-2020.) However, further development of the record was permitted on the issues of apportionment as well as completion of vocational reporting.

After further development of the record and following submission of issues as reflected in Minutes of Hearing/Summary of Evidence on 10-26-2021, Findings and Award with an Opinion on Decision issued on 12-23-2021, holding that applicant did not suffer any new and further disability. This latest decision reiterated findings from the previous F&A of 03-30- 2020 including:

> 5. Subsequent to 01-08-2018 but before five years expired from the date of injury, applicant's psychiatric condition worsened based on QME Dr. John Parke, therefore the Petition to Reopen was timely and the WCAB has jurisdiction.
>
> 6. Applicant's psychiatric injury is a compensable consequence and Labor Code section 4660.1(c) bars add-on disability for her psychiatric injury.
>
> 7. Applicant is entitled to pursue a vocational expert opinion.

> 8. QME Dr. Parke did not complete reporting on the existing issue of apportionment. Therefore, his opinion and that of the vocational experts cannot constitute substantial medical evidence.

(WCJ's Report, pp. 1-3.)

Applicant was evaluated by orthopedic qualified medical evaluator (QME) William Campbell, M.D., who assigned the following work restrictions:

> Permanent work preclusions remain indicated with regard to her low back and right hip. I do not feel the patient is able to return to her usual and customary work as a counselor with Health Net.
>
> In my opinion, work restrictions should be provided and remain unchanged as follows: the patient should be allowed to change positions frequently. No sitting or standing more than 20 minutes at one period of time before being able to change positions. No lifting more than 10 pounds. No repetitive bending or twisting.
>
> If permanent work restrictions are not available, then the patient is eligible for supplemental job displacement benefit.
>
> With regard to her right wrist and left wrist, at this time, it is my opinion, restricted work is appropriate for this patient.

(Joint Exhibit 106, Report of William Campbell, M.D., May 21, 2018, p. 13.)

Applicant provided vocational evidence at trial from Jeff Malmuth, who analyzed applicant's vocational feasibility using both orthopedic and psychiatric work restrictions. Mr. Malmuth analyzed the orthopedic restrictions, in pertinent part, as follows:

> Here, Ms. Hargerty's job as a Counselor was essentially of a Sedentary and Semi-sedentary nature. She did not appear to be routinely required to perform any strenuous duties. Overall, Ms. Hargerty should therefore be able to perform post-injury employment at the following disability levels per the [1997] WCAB Spine and Torso Guidelines:
>
> Disability Resulting in Limitation to Sedentary Work ... Contemplates the individual can do work predominantly in a sitting position at a bench, desk or table with a minimum of demand for physical effort and with some degree of walking and standing being permitted.
>
> Disability Resulting in Limitation to Semi-Sedentary Work ... Contemplates the individual can do work approximately 50% of the time in a sitting position, and approximately 50% of the time in a standing or walking position, with a minimum of demand for physical effort whether standing, walking, or sitting.

(Applicant's Exhibit 2, Report of Jeff Malmuth, December 28, 2020, p. 7.)

Applicant was further evaluated by psychological qualified medical evaluator (QME) John Park, Psy.D., who assigned the following work restrictions:

1) The applicant should not be given work where she has to direct and advise others.

2) The applicant should not be giving work where she needs to recognize potential physical hazards and follow appropriate precautions.

3) The applicant should not be given tasks requiring responsibility for direction, control and planning.

4) She should not be given work that requires negotiating, explaining or persuading others.

(Joint Exhibit 104, Report of John Park, Psy.D., April 29, 2016, p. 20.)

Mr. Malmuth noted the following in his report: "If the Trier of Fact finds Dr. Parke's findings formal work restrictions it would appear that all 3 vocational experts will have arrived at the same conclusion that Ms. Hargerty is not amenable to vocational rehabilitation and is thus unemployable and has sustained a total loss of earning capacity." (Applicant's Exhibit 2, Report of Jeff Malmuth, December 28, 2020, p. 40.)

DISCUSSION

Per the WCJ's Report:

> It is undisputed that applicant is disabled and has not returned to gainful employment since the industrial injury. She is a Social Security recipient and believes she the Social Security award is entirely to her industrial injury. However, in terms of her workers' compensation case, there are important nonindustrial factors at play.
>
> On an orthopedic basis, applicant rates 27% after apportionment and has work restrictions including 10 pounds for lifting, no repetitive bending or stooping, 20 minutes limit on standing and a need to change positions at will. (Ex. 106 at 13; Ex. 108 at 10.) The work preclusions in and of themselves are limitations which, when considered alone, do not preclude applicant's return to the workplace.
>
> Applicant's vocational expert Mr. Malmuth opines that applicant cannot return to competitive employment nor is she amenable to vocational rehabilitation. However, the vocational opinion is predicated on applicant's psychiatric condition and the Labor Code precludes additional disability on a psychiatric basis due to applicant's date of injury. In addition, there is apportionment as to non-industrial orthopedic and psychiatric factors, which are not adequately addressed by the vocational expert. As such, the vocational evidence is not substantial evidence.

A. There was No Timely Appeal of the Findings and Award of 03-30-2020 Barring Additional Permanent Disability for Psychiatric Injury under Labor Code section 4660.1

For applicant's date of injury after January 1, 2013, Labor Code section 4660.1(c) bars add-on disability for her psychiatric injury. As set forth in the latest F&A of 12-23-2021, no appeal was taken of Finding Number 6 of the F&A of 03-30-2020. The decision of 03-30-2020 specifically found that applicant's psychiatric injury was a compensable consequence. Section 3 beginning at page 6 of the Opinion on Decision of F&A of 03-30-2020 discusses the facts to show that applicant's psychiatric compensable consequence occurred gradually and not at the time of the slip and fall. Moreover, in the same section of the opinion it was determined that the facts surrounding applicant's slip and fall accident did not warrant an exception to Labor Code section 4660.1(c) as the result of either a violent act or catastrophic injury. As no petition for reconsideration was filed following the F&A of 03-20-2020, it is final and no appeal can be taken at this late date as stated the latest F&A of 12-23-2021.

Labor Code section 5902 requires that a petition for reconsideration set forth specifically and in full detail the grounds for reconsideration. Board Rule 10945(a) prohibits statements which are substantially misleading or not representative of the facts. Attempts at reconsideration of issues already decided is prohibited. Applicant's repeated efforts to do so in this case warrants admonishment.

B. Applicant's Vocational Evidence Is Insufficient to Rebut the PDRS on an Industrial Basis

The 2005 Permanent Disability Ratings Schedule ("PDRS") is rebuttable. *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal. App. 4th 808. A well-established method for rebutting a scheduled rating is to demonstrate that the injured employee is not able to benefit from vocational rehabilitation and, consequently, the employee's diminished future earning capacity is greater than that reflected in the PDRS. *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262. However, where apportionment to non-industrial factors exists in the medical evidence, apportionment must be addressed by the vocational and the vocational expert's opinion in order to constitute substantial evidence.

Petitioner argues that expert Mr. Malmuth performed a comprehensive vocational evaluation to determine that applicant cannot return to competitive employment and is not amenable to any form of vocational rehabilitation. Without citation to the record, applicant argues that Mr. Malmuth considers Dr. Campbell's orthopedic limitations. In fact, the vocational expert bases his findings on applicant's psychiatric impairment, as set forth by Dr. Parke. From Opinion on Decision:

> "The factors Mr. Malmuth relies upon are those attributed to applicant's psychiatric condition based on Dr. Parke's reporting. First, applicant has "marked" impairment with concentration, persistence and pace including inability to follow complex instructions or prioritization. She is also unlikely to keep pace with production demands. (Ex. 3 at 7.) Second, there is "marked" impairment in complex work-like settings, which was demonstrated when applicant had to be redirected during the psychiatric QME interview, thus showing an inability to handle stressful situations. (Ex. 3 at 7-8.) Dr. Parke and Mr. Malmuth argue there is a "synergistic interplay" between the orthopedic and psychiatric injury. However, the limitations which form the basis for Mr. Malmuth's reporting are psychiatric. That is, essentially no physical limitations are described in any detail in the vocational reporting. In this regard, the prior determination that Labor Code section 4660.1(c) bars add-on disability for her psychiatric injury also defeats the vocational opinion." (Opinion on Decision to Findings and Order 12-23-2021 at 5-6.)

This case is also complicated by the issue of apportionment on a psychiatric basis. The undisputed evidence shows apportionment to applicant's prior history of traumatic exposure and her prior history of addiction. As stated in the Opinion on Decision:

> "Finding number 8 required the parties to develop the record with QME Dr. Parke on the issue of apportionment. In fact, Dr. Parke finds apportionment under Labor Code Section 4663. In the supplemental report of August 28, 2020, there is 15% nonindustrial apportionment to applicant's traumatic exposure (violence, rape and the shooting death of the applicant's grandchildren's father). (Ex. 111 at 37-38.) In addition, at his deposition, Dr. Parke found apportionment to applicant's history of addiction. Though applicant was in successful recovery for many year, Dr. Parke testified:
>
> "[A]ddiction patterns have a remarkable tendency to remain potentially active. The tendency to reach for a substance when external problems arise, it's very robust. And no matter how many years of recovery someone has, the addiction can just come out of nowhere and pull the person back into deep addiction. (Ex. 112 Depo p. 15-16.)
>
> In response to defense counsel's question of whether QME would assign some percentage to applicant's non-industrial addiction tendencies, Dr. Parke responded: "50/50 would be fair." (Ex. 112 at 16.) Dr. Parke testified that to an additional 5% apportionment based on applicant's addictive tendencies such that a 50/50 split of

> applicant's relapse between industrial and non-industrial, which amounts to at least 17.5% apportionment of psychiatric disability to non-industrial factors. (Ex. 112 at p. 32-33.) As there is no conflicting evidence to the apportionment determination and Dr. Parke has exercised his judgement as a physician, I accept the apportionment to psychiatric disability.

(Opinion on Decision to Findings and Order 12-23-2021 at 4-5.)

Cases have held that vocational experts must consider nonindustrial factors in assessing applicant's claim for total permanent disability. (See *Perez v. Orange Plastics,* 2011 Cal. Wrk. Comp. P.D. LEXIS 444 wherein applicant had barriers of limited English skill and demonstrated lower than average academic abilities); *Hernandez v. WCAB* (2012) 78 Cal. Comp. Cases 56 (writ denied) wherein vocational expert did not adequately analyze injured workers inability to speak English and limited educational skill.)

Applicant's vocational expert does not adequately address apportionment. In . . . his final report of 06-09-2021, Mr. Malmuth glosses over apportionment by concluding that despite any preexisting problems applicant may have had, she was working full time when she was injured; therefore, her work injury caused her total loss of earnings capacity. (Ex. 3 at 12.) This could be true as to orthopedic limitations. However, applicant's addictive tendencies and traumatic exposures are an integral cause of her impairment on a psychiatric basis. Applicant concedes amounts to apportionment of at least 17.5%. (Ex. 112 at 31.)

According to QME Dr. Parke, the primary reason for reopening of this case and the worsening of her psychiatric condition is applicant's relapse into substance abuse; in deposition, the Dr. Parke acknowledges applicant's several relapses with alcohol as occurring through January of 2020. (Ex. 101 at 27-28, 39-41; Ex. 112 at 7-10.) In terms of apportionment, Dr. Parke opines that fifty percent of her relapse is non-industrial. (Ex. 12 at 16.) The converse is fifty percent of the cause of her relapse is attributed to preexisting nonindustrial factors. As such, the conclusory statement by the vocational expert cannot pass muster.

An additional unresolved point of contention is the vocational expert's reliance on the undefined concept of "synergistic interplay" between "orthopedic to multiple body parts and psychiatric with attendant functional limitations" in the conclusion of the reporting. (Ex. 3 at 11-12.) Again, the role of orthopedic limitations in terms of vocational loss is not defined and is probably minimal. Psychiatric impairment plays the central role. Therefore, simple subtraction of based on the medical experts will not suffice.

For the reasons set forth, applicant's vocational reporting falls short of constituting substantial evidence. As such, there no additional permanent disability is warranted.

(WCJ's Report, pp. 3-9.)

In addition to the reasons stated by the WCJ, we would further add that pursuant to the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes I*"), the Appeals Board held that Labor Code section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, and that the Labor Code makes no statutory provision for "vocational apportionment." The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. The Board explained that 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 industrial injuries. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*"). In short, vocational evaluators are to provide vocational opinions and medical experts are to provide medical opinions.

In this case, applicant's vocational expert attempts to improperly interject his own medical opinions into the case regarding apportionment and the synergistic interplay of applicant's disabilities. A vocational evaluator does not create medical facts in a case. Vocational experts review the medical record created by the doctors and reach conclusions as to applicant's vocational feasibility based upon that record.

Section 4660.1(c) states:

> (c) (1) Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

> (2) An increased impairment rating for psychiatric disorder shall not be subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:
>
> > (A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.
> >
> > (B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

(§ 4660.1(c).)

It has long been held that: "[B]asic rules of procedure require the board to give res judicata effect to its final decisions." (*Dow Chemical Co. v. Workers' Comp. Appeals Bd.* (1967) 67 Cal.2d. 483, 491 (citations omitted).) Applicant previously proceeded to trial and a finding issued that applicant's psychological permanent disability is not compensable per section 4660.1(c). Applicant did not seek reconsideration of that finding, and thus it is final and we are bound by it. Accordingly, applicant may not now relitigate the issue. However, even if we were able to review the issue on the merits, we would not find applicant's psychiatric disability compensable because applicant failed to demonstrate that the physical injury was catastrophic. (See *Wilson v. State of California Cal Fire* (2019) 84 Cal.Comp.Cases 620 (Appeals Board en banc).)

Accordingly, as our Decision After Reconsideration we affirm the December 23, 2021 F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on December 23, 2021, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 29, 2025

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

CYNTHIA HARGERTY
FARNSWORTH LAW GROUP
COLEMAN CHAVEZ & ASSOCIATES, LLP

EDL/mc

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