WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICK ARGUELLO, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILIATION, legally uninsured; CALIFORNIA INSTITUTE FOR MEN, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ11978462
San Bernadino District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

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.

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

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 December 5, 2024, and 60 days from the date of transmission is February 3, 2025. This decision is issued by or on February 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 December 5, 2024, and the case was transmitted to the Appeals Board on December 5, 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 December 5, 2024.

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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I DISSENT. (See attached Dissenting Opinion.),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2025

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

RICK ARGUELLO
FERRONE AND FERRONE LAW GROUP
STATE COMPENSATION INSURANCE FUND

JMR/bp

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

DISSENTING OPINION OF COMMISSIONER JOSÉ RAZO

I respectfully dissent. I would grant reconsideration, rescind the First Amended Findings and Award (F&A) of December 5, 2024, and return the matter for further development of the record for the reasons stated below.

A WCJ's decision must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [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 Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]*; Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Section 4663 provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) A doctor who prepares a report addressing the issue of permanent disability due to a claimed industrial injury must address the issue of causation of the permanent disability. (Lab. Code, § 4663(b).) Section 4663 requires that the doctor "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." (Lab. Code, § 4663(c).) Pursuant to section 4663(c) and section 5705, applicant has the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury, while defendant has the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 612-613.) Thus, a report by a physician addressing the issue of apportionment must be supported by substantial evidence. (*Id.* at p. 620, citing Lab. Code, § 5952(d).)

I believe that the medical reporting from the internal medicine qualified medical evaluator (QME) Dr. Graham Woolf and psychiatric QME Dr. Perry Maloff do not constitute substantial evidence as to causation and apportionment.

First, substantial evidence does not support Dr. Maloff's determination that the psychiatric injury should not be apportioned. In his QME report of January 23, 2023, Dr. Maloff described an "extremely traumatic childhood" for applicant, including being told he was an unwanted child by his parents, an absent father for most of his childhood, a distant and difficult relationship with his mother, living through a violent civil war in his home country, food scarcity, and abuse by a family member. (Ex. 3, Report of Dr. Perry Maloff dated 1/23/20, pp. 4-8.) Applicant also indicated to Dr. Maloff that he no longer had any concern that he had been infected with HIV or any other illness and does not believe he will contract any illness due to being exposed to the HIV positive blood at work. (Ex. 3, pp. 13-14.)

Next, internal medicine QME Dr. Woolf's conclusions regarding causation and apportionment are also not supported by substantial evidence. Dr. Woolf found that "apportionment is not indicated as he did not have upper GI symptoms prior to his employment and injuries" but also stated that "causation is secondary to his work related stress of his employment and use of NSAIDs." (Ex. 4, Report of Dr. Graham Woolf dated 5/20/24, p. 8.)

Further, application of Table 6-3 in the AMA Guides by the internal medicine and gastroenterology QME Dr. Woolf is not supported by substantial evidence. In his report of May 20, 2024, Dr. Woolf stated:

> In my opinion at this time his epigastric pain, hiccups and heartburn would best fall into Upper Digestive Tract Class 2, Table 6-3, pg 121 of the AMA Guides 5th ed. The Class 2 range is 10-24% Whole Person Impairment. In my best estimate I would give him 15% since he requires continuous treatment with omeprazole daily. I placed him in the lower range of the Class as **he has not lost weight**. He does not

> belong in Class 1 since he is taking acid supressing medications daily to control his symptoms.

(Ex. 4, p. 8, emphasis added.) As applicant has not lost weight below his desirable weight, he does not meet the requirements of Category 2 of Table 6-3. Therefore, Dr. Woolf's reporting is not substantial medical evidence as to apportionment and permanent disability.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes (Grace) v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) The Appeals Board has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403.)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*., *supra*, 79 Cal.App.4th at p. 404.)

When the record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. L.A. County Metro. Transit Authority*, *supra*, 67 Cal.Comp.Cases at p. 142.) If the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, the selection of an agreed medical evaluator (AME) by the parties should be considered, or alternatively, the WCJ may appoint a regular physician. (*Id*.)

Therefore, I would grant reconsideration, rescind the F&A of December 5, 2024, and return the matter for further development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2025

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

RICK ARGUELLO
FERRONE AND FERRONE LAW GROUP
STATE COMPENSATION INSURANCE FUND

JMR/bp

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

REPORT AND RECOMMENDATION ON DEFENDANT'S PETITION FOR RECONSIDERATION

I. INTRODUCTION

Identity of Petitioner:	Defendant.
Timeliness:	The petition was filed timely.
Verification:	The petition was properly verified.
Date of Award:	November 6, 2024
Date of First Amended Award	December 5, 2024
Date of Transmission to WCAB	December 5, 2024

II. CONTENTIONS

1. The WCJ acted without or in excess of its powers;
2. The evidence does not justify the findings of fact; and
3. The findings of fact do not support the order, decision or award.

III. FACTS

The Applicant, through his attorney of record filed an Application for Adjudication on February 28, 2019 claiming injury to the nervous system – psyche and other body systems noting he was "exposed to bloodborne [sic] pathogen injured psych and internal" as a result of a specific injury on September 8, 2018. (EAMS Doc ID No. 28624422). Following a Mandatory Settlement Conference on July 18, 2024, the matter was set for trial on August 19, 2024 before the undersigned. On August 19, 2024, the parties entered stipulations, issues, and exhibits into the record and continued the matter to September 9, 2024 for Applicant's testimony.

Applicant relied upon reporting of Psychiatric Panel QME Dr. Perry Maloff (Exhibits "1"-"3") and Internal Panel QME, Dr. Graham Woolf (Exhibits "4"-"6"). Defendant relied upon the reports of Dr. Woolf (Exhibits "A" and "B"), Deposition testimony of Dr. Maloff (Exhibit "C"), Defendant's own correspondence to Dr. Maloff (Exhibit "D"), Reporting of internal treating physician, Dr. Alex Lira (Exhibit "E"), Reporting of psyche treating physician, Dr. David Friedman (Exhibits "F" and "G") as well as Benefits and IDL Printouts (Exhibits "H" and "I"). The applicant testified at trial and the matter was submitted on September 9, 2024.

The undersigned issued a Findings and Award and Opinion on Decision on November 6, 2024 (EAMS Doc ID Nos. 78555802 and 78555795).

On November 20, 2024, Applicant filed a Petition for Amended Findings and Award requesting correction of a clerical error regarding the number of weeks of permanent disability. (EAMS Doc ID No. 55018012).

On November 25, 2024, Defendant filed a Petition for Reconsideration alleging the WCJ acted without or in excess of his powers; evidence does not justify the findings of fact; and the findings of fact do not support the order, decision or award. ("the Petition") (EAMS Doc ID No. 55100765).

On December 5, 2024, the undersigned issued a First Amended Findings and Award and Opinion on Decision correcting the number of weeks of permanent disability pursuant to the Applicant's Petition to Amend Findings and Award.

As of the date hereof, Applicant has not filed a response to Defendant's Petition for Reconsideration.

IV. DISCUSSION

1. Substantiality of Internal QME Dr. Woolf's Reporting as to Apportionment

Defendant argues that the Internal QME Reporting of Dr. Woolf is not substantial medical evidence as to apportionment.

Labor Code 4663 provides that apportionment of permanent disability shall be based upon causation as determined and discussed in the medical report. (*Andersen v. Worker's Comp. Appeals Bd.* 149 Cal.App.4th 1369 at 1381). Apportionment may be attributed to pathology, asymptomatic prior conditions, and retroactive prophylactic preclusions, provided there is substantial medical evidence establishing these factors have caused permanent disability. (*Escobedo v. Marshalls* (2005) 70 CCC 604, 612 (en banc)). Defendant bears the burden of proof on apportionment. (*Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal. 3d 450, 456; *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535, 1560; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal. App. 4th 1099, 1115; *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 613 (Appeals Board en banc).

Here, Defendant argues that Dr. Woolf's reporting is not substantial medical evidence as to apportionment. The undersigned agrees, in part. Dr. Woolf's opinion provides no substantial medical evidence on which the Board can find any non-industrial apportionment. Instead, Dr. Woolf notes that apportionment is "not indicated." (Exhibit "4" pg. 8). Additionally, Dr. Lira's internal report provides no basis for non-industrial apportionment. (See Exhibit "E"). Defendant has thus provided no substantial medical evidence of apportionable disability. Defendant failed to meet their burden of proof on apportionment from an internal medicine standpoint.

2. Permanent Disability Pursuant to Class 2 Table 6-3 of the AMA Guides, 5th Ed.

Defendant argues that Dr. Woolf incorrectly rated Applicant's whole person impairment by opining Applicant falls into Class 2, Table 6-3 of the AMA Guides because Applicant did not have the requisite weight loss.

Page 120 of the AMA Guides includes Table 6-1, which sets forth a height/weight chart listing "Desirable Weights." Immediately below Table 6-1 is a paragraph which reads**,**

> Tables 6-1 and 6-2 present desirable weights according to height for men and women, respectively. For an obese person, the usual preimpairment weight may not be as physiologically desirable as the current weight. Thus, the

examiner should use his or her clinical judgment when assessing the relative importance of weight loss.

Table 6-3 on page 121 of the AMA Guides provides the criteria for Rating Permanent Impairment Due to Upper Digestive Tract.

Class 1 requires "Symptoms or signs of upper digestive tract disease, or anatomic loss or alteration **and** continuous treatment not required **and** maintains weight at desirable level or no sequelae after surgical procedures."

Class 2 requires "Symptoms and signs of upper digestive tract disease, or anatomic loss or alteration **and** requires appropriate dietary restrictions and drugs for control of symptoms, signs, or nutritional deficiency **and** weight loss below desirable weight but does not exceed 10%."

Example 6-6 on page 123 of the AMA Guides demonstrates that a 43 year-old man with "occasional sour regurgitation into mouth" who observes "excellent relief with intensive doses of omeprazole" and who has "unremarkable; minimal weight loss" would appropriately fall into Class 2 with a 15% impairment rating.

In his May 20, 2024 report, Dr. Woolf opined that Applicant best falls into Upper Digestive Tract Class 2, Table 6-3, pg. 121 of the AMA Guides. (Exhibit "4" pg. 8). Dr. Woolf stated "I would give him 15% since he requires continuous treatment with omeprazole daily. I placed him in the lower range of the Class as he has not lost weight. He does not belong in Class I since he is taking acid suppressing medications daily to control his symptoms." (*Id.*).

Dr. Woolf adequately explains his classification of Applicant into Class 2 despite having lost no weight because of Applicant's need for medication. This is not only permitted by the Guides for an obese person[1] (page 120), but is demonstrated by example (page 123). Dr. Woolf's reporting appears to have complied with the AMA Guides and is substantial medical evidence as to permanent disability.

3. Substantiality of Dr. Maloff's Reporting as to Apportionment

Defendant argues that Dr. Maloff's reporting is not substantial as to apportionment because he refused to address apportionment under SB 899 and *Escobedo* and that Dr. Maloff failed to discuss Applicant's "voluminous" pathology.

As noted above, Defendant bears the burden of proof on Apportionment. Contrary to Defendant's assertion, Dr. Maloff considered and discussed Applicant's history. (See Exhibits "1-3"). Dr. Maloff noted a remarkable history of adjustment given Applicant's traumatic childhood (Exhibit "2" pg. 32) noting his successful work life and high school career. (*Id.*). Dr. Maloff also discussed Applicant's successful coping mechanisms and overall "excellent performance in his position with the California Institution for Men. (*Id.* pg. 33). Based on Dr. Maloff's thorough discussions of Applicant's history, I found it reasonable for Dr. Maloff to opine that non-industrial apportionment was not indicated. As Defendant did not present substantial medical evidence that there was non-industrial apportionment, they failed to carry their burden. As such, Applicant is entitled to an unapportioned award.

[1] Dr. Woolf notes Applicant was obese based on his BMI of 39.2 (Exhibit "4" pg. 7).

4. Physiological and Psychological Overlap

Defendant argues that the physiological impairment should not have been combined with the psychological impairment because the impairments overlap.

First, Defendant presented no medical opinion to corroborate the alleged overlap. Dr. Maloff reported a whole person impairment according to a GAF score. Dr. Woolf reported a whole person impairment according to the AMA Guides. Neither doctor opined that these impairments overlapped. Absent substantial medical evidence that the permanent disability should be decreased below that opined by the medical evidence, the Applicant is entitled to combined impairment ratings from each doctor.

Second, The GAF score provided by Dr. Maloff was based on the lowest domain, which was Applicant's social functioning (Exhibit "1" pg. 3-4). Dr. Maloff's discussion highlights the impact of Applicant's emesis on Applicant's social life. (Exhibit "1" pg. 4). Dr. Maloff focused on Applicant's self-consciousness, difficulties speaking/communicating, and interacting with people. (*Id.*). On the other hand, Dr. Woolf, provided impairment based on Table 6-3 of the AMA Guides, which does not factor in any social aspect, focusing instead on symptoms of upper digestive tract disease, dietary restrictions/use of medications, and (subject to clinical judgement in the case of obese persons) weight loss. The medical evidence provided demonstrates a lack of overlap. Applicant should be afforded the combined disability of impairment provided by Dr. Maloff and Dr. Woolf.

IV. RECOMMENDATION

The undersigned respectfully recommends Defendant's Petition for Reconsideration be denied.

THE MATTER WAS TRANSMITTED TO RECONSIDERATION UNIT ON DECEMBER 5, 2024.

DATE: December 5, 2024

Brandon Powell
WORKERS' COMPENSATION
ADMINSTRATIVE LAW JUDGE