WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

STEVE FAUSTINA, *Applicant*

vs.

COUNTY OF LOS ANGELES, PERSMISSIBLY SELF-INSURED, *Defendants*

Adjudication Numbers: ADJ10627978; ADJ10627961; ADJ10627984
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant County of Los Angeles seeks reconsideration of the February 2, 2022 Joint Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that in Case No. ADJ10627978, applicant, while employed as a firefighter from May 1, 2002 to August 17, 2016, sustained industrial injury to his respiratory system, eyes, left shoulder, upper extremities, and in the form of myasthenia gravis. In Case No. ADJ10627961, the WCJ found that applicant, while employed as a firefighter on August 18, 2016, sustained industrial injury to his low back. In Case No. ADJ10627984, the WCJ found that applicant, while employed as a firefighter on July 18, 2015, sustained industrial injury to his low back. The WCJ found that applicant's injuries resulted in disability that was permanent and total, without legal basis for apportionment.

Defendant contends that the Award does not appropriately consider nonindustrial orthopedic apportionment; that applicant's vocational reporting does not constitute substantial evidence because it is inconsistent with the medical evidence; and that applicant's vocational reporting is based on flawed and inaccurate data.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons set forth in the Report, which we adopt and incorporate, and for the reasons discussed below, we will affirm the F&A.

FACTS

Applicant has three pending cases. In ADJ10627978, applicant claimed injury to his right shoulder, knees, respiratory system, myasthenia gravis, eyes, left shoulder, and bilateral upper extremities while employed as a firefighter by defendant County of Los Angeles from May 1, 2002 to August 17, 2016. Defendant admits injury to the right shoulder and knees, but disputes injury to the respiratory system, myasthenia gravis, eyes, left shoulder and bilateral upper extremities.

In ADJ10627961, applicant sustained admitted injury to his low back while employed as a firefighter by defendant County of Los Angeles on August 18, 2016. In ADJ10627984, applicant sustained admitted injury to his low back while employed as a firefighter by defendant County of Los Angeles on July 18, 2015.

Pursuant to Labor Code[1] section 3201.7, the parties are subject to an Alternative Dispute Resolution (ADR) Program, in which an Independent Medical Evaluator (IME) is selected in each medical specialty as necessary. Here, the parties have selected Chester Hasday, M.D., as the IME in orthopedic medicine, Lawrence Richman, M.D., as the IME in neurology, Mara Recasens, M.D., as the IME in ophthalmology, and Jonathan Green, M.D., as the IME in internal medicine. In addition, the applicant has obtained vocational expert reporting from Antonio Reyes, Ph.D., while defendant has obtained vocational expert reporting from Kelly Winn, M.S.

On September 8, 2021, the parties proceeded to trial, framing in relevant part issues of permanent disability and apportionment.

On October 14, 2021, the WCJ heard testimony from applicant, and ordered the matter submitted for decision.

On February 2, 2022, the WCJ issued his F&A, determining in relevant part that applicant's disability was permanent and total without legal basis for apportionment. (Findings of Fact Nos. 6

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

& 7.) The WCJ's Opinion on Decision explained that applicant's testimony was consistent and credible, and conformed to the medical reporting in evidence. (Opinion on Decision, at p. 2.) The WCJ found the reporting of the various IMEs to constitute substantial evidence and further determined that pursuant to the IME and vocational reporting, that applicant was not feasible for vocational retraining. (*Ibid*.) In addition, the WCJ determined that defendant did not meet its burden of proving apportionment to nonindustrial or prior industrial factors, and that applicant was entitled to an unapportioned award. (*Id.* at p. 3.)

Defendant's Petition contends the WCJ did not properly consider the reporting of the orthopedic IME which describes non-industrial apportionment. (Petition, at p. 10:5.) Defendant further contends that the vocational rehabilitation conclusions reached by Dr. Reyes are inconsistent with the IME opinions that applicant is capable of returning to the workforce. (*Id.* at p. 12:7.) Defendant also contends the reporting of Dr. Reyes was based on flawed or inaccurate data. (*Id.* at p. 14:4.)

Applicant's Answer responds that IMEs Dr. Richman and Dr. Recasens have both opined that applicant is permanently and totally disabled. Moreover, the reporting of vocational expert Dr. Reyes establishes that applicant is not feasible for a return to the open labor market. (Answer, at p. 5:4.) Applicant asserts the reporting of defendant's vocational expert Ms. Winn is not substantial evidence because it misapprehends the industrial nature of applicant's preexisting ocular myasthenia gravis and MRSA infections. (*Id.* at p. 7:19) Applicant also avers the WCJ properly discounted nonindustrial apportionment based on the vocational expert's assessment of "vocational apportionment" and because the underlying apportionment opinions described by the IMEs are not substantial evidence. (*Id.* at p. 9:10.)

DISCUSSION

The WCJ has determined that applicant's disability is permanent and total based on the reporting of vocational expert Dr. Reyes and IMEs Dr. Richman and Dr. Recasens. (Opinion on Decision, at p. 2.)

Applicant's vocational expert Dr. Reyes has concluded that applicant is not feasible for vocational retraining. (Ex. 3, Report of Antonio Reyes, Ph.D., dated November 7, 2019, at p. 17.) Dr. Reyes bases his opinions on a combination of vocational testing and a review of the functional limitations and work restrictions described by IME Dr. Richman in neurology and Dr. Recasens

in ophthalmology. (*Ibid*.) In addition, the WCJ observes that both Dr. Richman and Dr. Recasens have independently opined that applicant's industrially-related myasthenia gravis would result in periods of exacerbated symptoms, and the need for regular infusions and associated periods of recovery, all of which would materially impair applicant's ability to compete in the open labor market. (Ex. 1, Report of Antonio Reyes, Ph.D., dated February 11, 2021, at pp. 2-3; Ex. 9, Transcript of the Deposition of Martha Reyes, M.D., dated September 10, 2019, at p. 25:14.)

We also note the WCJ's determination that applicant's testimony was "credible and consistent." (Report, at p. 8.) We have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.)

Following our independent review of the record, we concur with the WCJ's determination that the reporting of Dr. Reyes constitutes substantial vocational evidence. (See *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 751 [2023 Cal. Wrk. Comp. LEXIS 46] (Appeals Bd. en banc) ["[t]he same considerations used to evaluate whether a medical expert's opinion constitutes substantial evidence are equally applicable to vocational reporting"].) Because the vocational reporting demonstrates that applicant is "not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating," we agree with the WCJ that applicant's disability is both permanent and total. (Finding of Fact No. 6; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587]; *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]; *Applied Materials v. Workers' Comp. Appeals. Bd.* (*Chadburn*) (2021) 64 Cal.App.5th 1042 [86 Cal.Comp.Cases 331].)

Defendant contends the WCJ's decision does not account for the nonindustrial apportionment identified by orthopedic IME Dr. Hasday. (Petition, at p. 10:5.) In his report of June 12, 2019, Dr. Hasday offered the following apportionment analysis:

> In regard to the applicant's right shoulder and compensable consequence left shoulder, I would apportion 10% due to preexisting AC joint arthrosis and 90% to continuous trauma AOE/COE his employment. In regard to the applicant's low back, I believe that the applicant's specific injury of August 17, 2016 represented a temporary exacerbation of his prior low back injury of July 18,

> 2015. Apportionment of the applicant's low back remains unchanged: 10% due to preexisting degenerative disc disease and congenitally short pedicles and 90% due to his specific injury of July 18, 2015.

(Ex. 1, Report of Chester Hasday, M.D., dated June 12, 2019, at p. 28.)

The reporting of vocational expert Dr. Reyes acknowledges Dr. Hasday's opinions regarding nonindustrial apportionment. (Ex. 3, Report of Antonio Reyes, Ph.D., dated November 7, 2019, at p. 18.) However, Dr. Reyes further indicates that "vocational apportionment does not necessarily follow medical apportionment," and because applicant had no pre-existing or nonindustrial impairment that resulted in a work disabling condition, and because applicant was able to perform his regular work without limitation prior to his injuries, applicant's residual disability is "100% industrial." (*Ibid*.)

However, in our en banc decision in *Nunes, supra*, 88 Cal.Comp.Cases 741, we held that vocational evidence must 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*.)

Here, the apportionment analysis of Dr. Reyes is predicated on impermissible "vocational apportionment," which cannot be substituted in place of valid medical apportionment. Accordingly, insofar as the vocational expert fails to consider valid medical apportionment, Dr. Reyes' analysis of apportionment is not substantial evidence. (*Nunes, supra*, at p. 754.)

The WCJ's Report explains, however, that his finding of permanent and total disability is premised on the medical opinions of IME Drs. Richman in neurology and Dr. Recasens in

ophthalmology, and that neither IME physician described nonindustrial apportionment. (Report, at pp. 6-7.)

In addition, the February 11, 2021 supplemental reporting of vocational expert Dr. Reyes reviews the deposition testimony of neurology IME Dr. Richman and notes that "Dr. Richman again stated that Mr. Faustina would be unable to return to work as a firefighter but raised a possibility that he may be able to perform less physically demanding jobs when considering his fatigue." (Ex. 1, Report of Antonio Reyes, Ph.D., dated February 11, 2021, at p. 3.) In response, however, Dr. Reyes offered an analysis limited to the medical conclusions reached by IME Dr. Recasens, who had previously opined that applicant was unable to return to the open labor market. Applicant's vocational expert observed:

> Dr. Recasen's opinions are consistent with what Mr. Faustina reported to me at my office. He continues to experience daily problems including fatigue and double vision that affect his ability to perform activities of daily living and tasks around his home. There are days when he has severe symptoms; on those days he is extremely limited in his activities and he would not be able to perform any type of work activity. His life is centered around the management of his symptoms.
>
> Vocational testing demonstrated that Mr. Faustina performs poorly when placed in a work-like environment. He performed poorly on several assessments due to problems with fatigue. He was unable to complete a simple physical test using his arms and hands. He demonstrated poor manual aptitudes and was unable to maintain a work pace. Even if Mr. Faustina is not precluded from working strictly on a medical basis, the vocational evidence demonstrates that he would not be able to maintain a job given how his symptoms affect his performance in a real-world work environment.
>
> No employer would retain an employee who may function on day but not the next due to fatigue or double vision. Employers rely on their employees to meet specific deadlines and adhere to work schedules. Additionally, every employee is required to meet expectations for productivity and work pace. No employer would be able to accommodate Mr. Faustina's problems given how he performed during testing at my office. Likely, his symptoms and problems would only become more severe if he were exposed to the stressors and rigors of work on a regular basis. The purpose of a vocational evaluation is to assess how medical impairment and limitations translate to a work environment. The results of the evaluation demonstrate that Mr. Faustina is severely limited in his ability to work. Considering the vocational evidence, Mr. Faustina should be considered 100% permanently and totally disabled as the result of his industrial injuries.

(*Id.* at pp. 3-4.)

Thus, to the extent that applicant's inability to reenter the labor market flows from his industrially-related myasthenia gravis condition which is not apportioned in the medical record, we concur with the WCJ's conclusion that applicant is entitled to an unapportioned award.

Irrespective of the above, however, we also observe that the orthopedic apportionment analysis described by Dr. Hasday does not constitute substantial medical evidence. In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (*Escobedo*) (Appeals Bd. en banc), we held:

> [T]o 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.
>
> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Id.* at p. 621.)

Thus, the apportionment opinion of the evaluating physician must address how and why nonindustrial and prior industrial factors are presently causing permanent disability. Here, Dr. Hasday apportions 10 percent of applicant's bilateral shoulder disability to "preexisting AC joint arthrosis." (Ex. 1, Report of Chester Hasday, M.D., dated June 12, 2019, at p. 28.) However, there is no discussion of how or why arthrosis is presently causing permanent disability, or how the IME arrived at a figure of 10 percent. Dr. Hasday also opines that 10 percent of applicant's low back disability is apportioned to preexisting degenerative disc disease and congenitally short pedicles. (*Ibid*.) This formulation appears to aggregate two independent factors of apportionment and does not explain the medical basis for how and why *either* condition is currently causing permanent disability. As it relates to both the shoulders and the low back, the IME's opinions on

apportionment offer conclusions without the substantive discussion required under section 4663 or *Escobedo* and therefore do not constitute substantial evidence. (*Escobedo, supra,* at p. 620 ["Even where a medical report 'addresses' the issue of causation of the permanent disability and makes an 'apportionment determination' by finding the approximate relative percentages of industrial and non-industrial causation under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence."].)

We thus agree with the WCJ that the evidentiary record establishes applicant's permanent and total disability without the need to consider orthopedic factors of disability. In the alternative, we observe that the apportionment opinions of the orthopedic IME do not constitute substantial evidence. Under either analysis, we conclude that applicant is entitled to an unapportioned award. We will affirm the F&A, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Award issued on February 2, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 30, 2025

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

STEVE FAUSTINA
STRAUSSNER, SHERMAN, LONNE, TREGER & HELQUIST
OFFICE OF THE COUNTY COUNSEL- LOS ANGELES

SAR/abs

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 PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicant's Occupation: county firefighter
2. Applicant's Age: 52
3. Date of Injury: May 1, 2002 through August 17, 2016
4. Parts of body injured: bilateral shoulders, knees, myasthenia gravis (hereinafter referred to as "MG"), eyes, upper extremities respiratory, and fibromyalgia. (ADJ10627978). Applicant also filed two specific claims relating to his low back, (ADJ10627984, ADJ10627961) with dates of injury of July 18, 2015, and August 18, 2016, respectively.
5. Identity of Petitioner: Defendant
6. Timeliness: The Petition was timely filed on February 23, 2022.
7. Verification: The Petition was appropriately verified on page 15 at the bottom.
8. Date of Issuance of Findings & Award was February 2, 2022. (decision)
9. Answer Filed: Yes, filed on March 4, 2022 (Answer).
10. Petitioner's Contentions: 1.) the award of total permanent disability does not accurately consider the existence of apportionment by Dr. Hasday, orthopedist. 2.) the vocational evidence relied upon is not substantial evidence as the various Independent Medical Examiner (IME) reporting are inconsistent with a finding of permanent total disability. 3.) the vocational evidence used has inaccurate facts of mechanisms, incorrect testing scores and invalid ability assessments making the vocational evidence not substantial evidence.

II.

FACTS

While employed by the County of Los Angeles as a firefighter, applicant sustained two industrial injuries on July 18, 2015, and August 18, 2016, as well as a cumulative injury from about May 1, 2002 through August 17, 2016. The specific injuries occurred to the low back. The applicant sustained admitted injury right shoulder and knees on a cumulative basis. Subsequently, the Applicant was found in the decision to have cumulative injuries to Myasthenia gravis

(hereinafter referred to as "MG"), eyes, upper extremities and respiratory. The parties had previously agreed by Stipulation that on April 1, 2009, applicant sustained industrial injury to MG, eyes and MRSA. (EAMS document# 35965690)

Applicant has not worked anywhere else since then as he was granted an employer service-connected disability retirement based on his Myasthenia Gravis (MG) (MOH/SOE, 10/14/21, Page 3, Line 3). On the merits, the discussion of Petitioner does lead to more information and discussion about the decision, a worthy result. However, the bottom line is two IME's have opined Applicant is permanently totally disabled, as set forth already. Any shortcomings or failures of the matter appear to be from the severity of applicant's illnesses, stopping now for trial and certainly not from his clarity and credibility.

By agreement with the employer, the MG was evaluated by Independent Medical Examiner (IME) in Neurology, Lawrence Richman, M.D., (Dr. Richman) was selected as an IME and is board certified in Neurology, Psychiatry and EMG (letterhead). Dr. Richman evaluated this applicant and had his deposition taken. He issued three reports and he summarizes the MG as follows:

> He also developed myasthenia gravis. The myasthenia gravis he developed initially involved the ocular muscles however in reality patients with ocular myasthenia show diffuse EMG abnormalities with single fiber EMG throughout the upper and lower limbs and other muscle groups, and in this respect myasthenia gravis despite being isolated to ocular muscles at any particular given time is in actuality a diffuse neuromuscular disorder.
>
> Currently the patient's reports the myasthenia gravis is well controlled on medications and immunomodulating [sic] therapy, however myasthenia gravis is known to fluctuate for no particular reason over time. (Joint Exhibit 8, Page 29, Paragraph 3 through 4.)

The MG illness treatment is intense as well. Applicant testified credibly at trial when he was recalling his visits to just one neurologist since 2009. The current treatment that Applicant gets now is called intravenous immunoglobulin (IVIG). The nurse comes and does the IVIG treatment and infuses the donor antibody IVIG bag. It's a five to six hour process. (MOH/SOE, 10/14/21, Page 3, Line 11)

Again, long ago, back in 2012, the parties stipulated Applicant sustained injury arising out of and in the course of employment to the MG. The initial injury was first finalized as a Stipulation signed in 2012. This matter is numbered ADJ6957357. (EAMS document# 35965690)

Separate from the neurology, the eye doctor ophthalmologist IME Marta Recasens, M.D., also has opined Applicant is permanently totally disabled (Joint Exh. 9, page 25:14.). "IME Dr. Recasens similarly found the applicant's ocular MG ...'it's not feasible for him to work' ... he is not able to go back to work at this point" (Joint Exh. 9, page 25:14.). It was clear from his testimony that he was quite careful about his eyesight and he did not really drive much (MOH/SOE, 10/14/21, Page 4, Line 5-6).

In general, starting with the IME evidence of Lawrence Richman, M.D. in testimony dated December 8, 2020 (deposition), he stated about causation of this MG: the treatment of the industrial MRSA with the antibiotic Cipro is classic MG scenario of "what brought this to surface," for this applicant. (Joint Exh. 5, 22:5-7.) There would only be MG apportionment after a new analysis regarding any potential malpractice about the dispensing of the antibiotics. (Joint Exh. 5, 17:25) The many facets to the disability including double vision, eye drooping, swallowing, and the bladder are named just to start. (Joint Exh. 5, 8:24-9:5.) Applicant has not sought the added orthopedic injuries mentioned in the Petition with request for even more permanent disability benefits that could warrant a larger permanent disability benefits finding for this worker, than set forth in the Answer.

So we are stopping now in discovery for trial. There is no need for further discovery as it would only show a credible worker with failures, shortcomings, etc. because of his significant disability not his personal credibility or accuracy. So the court has used the bibliography cited in the Answer: Antonio Reyes, PhD dated February 11, 2021, December 16, 2019, November 7, 2019. But it should be restated the IME medical evidence are IME Lawrence Richman, M.D. dated December 8, 2020 (deposition); September 25, 2018, February 4, 2018, December 6, 2017; IME Marta Recasens, M.D. dated September 10, 2019 (deposition); August 28, 2019, August 10, 2018, May 25, 2017, January 31, 2017; AND all are IME medical evidence from the union collective bargaining agreement format, with the weight of judge-picked doctors.

Ordinarily as is the case here, a reconsideration Petitioner may claim that the WCJ exceeded his powers when showing defect or error in connection with a WCJ's opinion on decision. The Board has long held that defects in the opinion may be cured through a judge's report on reconsideration that adequately explains the judge's reasoning in support of his or her trial findings. *[Smales v. WCAB,* 45 CCC 1026, (W/D -1980)] Here, the WCJ agrees with Petitioner that more comment and explanation in this report could add to the decision to prevent defect or

error by assisting the WCAB review. Moreover, this report on reconsideration can consider whether Defendant Petitioner suffers any self-imposed lack of diligence or other shortcomings which might reduce cost risk to Defendant Petitioner -- to be illuminated.

Applicant's counsel has filed a detailed Answer to the Petition. Defendant Petitioner argues three points of contentions. First, the award of total permanent disability does not accurately consider the existence of apportionment by Dr. Hasday, orthopedist. Second, the vocational evidence relied upon is not substantial evidence as the various Independent Medical Examiner (IME) reporting are inconsistent with a finding of permanent total disability. Finally, the vocational evidence used has inaccurate facts of mechanisms, incorrect testing scores and invalid ability assessments making the vocational evidence not substantial evidence. Adding from testimony, the court found Applicant to be a fully credible worker so applicant's failures and shortcomings in his vocational testing is either harmless error or indicative of his significant disability not his personal credibility or accuracy.

III.
ARGUMENTS

CONTENTION 1: THE AWARD OF PERMANENT TOT AL DISABILITY DOES NOT ACCURATELY CONSIDER APPORTIONMENT BY DR. HASDAY, ORTHOPEDIST.

The contention that the award of total permanent disability does not accurately consider the existence of apportionment by Dr. Hasday, orthopedist is fundamentally incorrect. Labor Code § 4660 and the 2005 schedule for rating disability are *only prima facie evidence of disability.* [See Labor Code § 4660(a) and (c) and *Department of Corrections v. WCAB (Fitzpatrick)* 83 C.C.C. 1680, 1690, 1692.] The decision relies upon the opinions of Dr. Lawrence Richman and Dr. Marta Recasens, both IME doctors. The decision should be evaluated based upon the analysis and against the requirements of *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084 and *Lebeouf v. Workers' Compensation Appeals Board* (1983) 48 Cal Comp. Cases 587 and the evidence relied upon to make the decision. Further, the point to the IME doctor schematic herein was to reduce litigation.

There would only be MG apportionment after a new analysis regarding any potential malpractice about the dispensing of the antibiotics (Joint Exh. 5, 22:5-7.) But, on the merits, the

discussion of Petitioner does lead to more information and discussion about the decision, a worthy result.

CONTENTION 2. THE VOCATIONAL EVIDENCE RELIED UPON IS NOT SUBSTANTIAL EVIDENCE AS THE VARIOUS IME REPORTING IS INCONSISTENT WITH A FINDING OF PERMANENT TOT AL DISABILITY.

I. Applicant is Permanently Totally Disabled

Labor Code §4660(b)(l) states that the description of injury shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the AMA Guides, 5th ed. The IME Lawrence Richman M.D. was selected in Neurology. Dr. Richman issued three reports and his deposition was taken. Dr. Richman is an expert in MG having treated dozens of cases of MG and multiple types of patients as described in his deposition. He reviewed his 3 board certifications for the parties. (Letterhead; Joint Exh. 5, 42:15.) Applicant's history is laid out as heard in testimony. Applicant's multiple conditions and disabilities are also listed. (Joint Exh. 5, 8:24-9:5.)

Separate from the neurology, the eye doctor ophthalmologist IME Marta Recasens, M.D., also has opined Applicant is permanently totally disabled (Joint Exh. 9, page 25:14.). "IME Dr. Recasens similarly found the applicant's ocular MG ...'it's not feasible for him to work' ... he is not able to go back to work at this point" (Joint Exh. 9, page 25:14.). It was clear from his testimony that he was quite careful about his eyesight and he did not really drive much (MOH/SOE, 10/14/21, Page 4, Line 5-6).

II. Applicant was a Fully Credible Worker

In this case the WCJ had an opportunity to see the applicant in person qt the trial in which the applicant testified. The defendant did not call any witnesses to refute the testimony of the applicant. The WCJ found the applicant credible and consistent with the medical record. Further, the WCJ relied on the reports and depositions of Dr. Richman who also found the applicant credible. (Joint Exh. 9, page 47:9.).

The Supreme Court has held that the WCAB should accord the trial judge's findings the great weight to which they were entitled since the trial judge had the opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their demeanor on the stand. *Garza v. WCAB* (1970) C3d 312; *United International Investigations v. WCAB* (2005) 70 CCC 352; and *Bracken v. WCAB* (1989) 54 CCC 349.

III. *Almaraz/Guzman, Lebouef* Rating

Under Almaraz/Guzman,2 a medical evaluator is empowered to use his or her clinical judgment, experience and expertise to interpret and apply any portion of the AMA Guides when rating an impairment. In *Lebeouf v. Workers' Compensation Appeals Board* (1983) 48 Cal Comp. Cases 587, the scheduled rating could be rebutted by a finding that the injured worker was not feasible for vocational rehabilitation. When enacting Labor Code §4660.1 for 2013 injuries and above, the legislature specifically addressed the continued viability of Labor Code §4662(b) and *Milpitas Unified School District v. WCAB* in Labor Code §4660.l(h). The un-rebutted expert evidence is --100% permanent total disability. Any further discovery or other theories to be probed by these capable attorneys would not change the case. That is why it was brought to the court at this time. The parties are not seeking more discovery.

CONTENTION 3. THE VOCATIONAL EVIDENCE HAS INACCURATE FACTS, INCORRECT SCORES, AND INVALID ABILITY ASSESSMENTS SO THE REPORTS ARE NOT SUBSTANTIAL EVIDENCE AS THE VARIO US REPORTING IS WRONG.

Overall, as was apparent at testimony, the court found Applicant to be a fully strongly credible worker so applicant's failure to finish his vocational testing is indicative of his disability not his credibility or accuracy. Defendant's allegation the vocational evidence used has inaccurate facts of mechanisms, incorrect testing scores and invalid ability assessments making the vocational evidence not substantial evidence is not persuasive. The Answer states ...

> The applicant was evaluated by Vocational Rehabilitation ("VR") Expert Dr. Antonio Reyes on November 7, 2019. The evaluation included 1.8 hours of interview and 1.8 hours of vocational testing. (Applicant's Exhibit 3 p. 2). Dr. Reyes noted that the applicant performed poorly on vocational tests,

demonstrated problems with fatigue that affected his ability to perform even simple physical tasks. (*Id*.). Ultimately, Dr. Reyes found the applicant permanently and totally occupationally disabled following his industrial injury. (*Id*.).

As it relates to apportionment, Dr. Reyes noted vocational apportionment does not necessarily follow medical apportionment and that the MG was the primary reason for the applicant's total disability. (Applicant's Exhibit 3 p. 18). Specifically, Dr. Reyes indicated, "Mr. Faustina's [sic] problems related to myasthenia gravis are primarily what make him totally disabled and that condition has been found 100% industrial. There is no evidence that Mr. Faustina [sic] had pre-existing or non-industrial impairments that resulted in a work disabling condition. Mr. Faustina [sic] performed physically demanding work fo.r many years before developing MRSA during the course of his work and subsequently suffering an aggravation of myasthenia gravis." (Applicant's Exhibit 3, p. 19).

Dr. Reyes agreed with IME' s Dr. Richman and Dr. Recasens opinions on the variability of his symptoms as an unsurmountable barrier to employment and continued to conclude that the applicant was 100% occupationally disabled. (*Id*.).

The applicant was also evaluated by Defense VR specialist Kelly Winn on May 26, 2020 with a report issuing on August 3, 2020. In that report Ms. Winn noted that the applicant attempted vocational testing but reported difficulties and could not finish. Consequently, Ms. Winn felt that the scores were likely invalid. (Defendant's Exhibit A p.14).

As was apparent at testimony, the court found Applicant to be a fully credible worker so applicant's failure to finish his vocational testing is indicative of his disability not his credibility or accuracy.

IV.

CONCLUSION

The applicant proved he was permanently totally disabled as the permanent disability opinion of two IME doctors. There was no rebuttal of this opinion. The doctor found that he could not return to gainful employment. Defendants did not rebut the findings of Dr. Richman and Dr. Recasens whose reports are substantial evidence. The contentions herein are not founded.

V.

RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

DATE: 3/9/2022

Steven Carbone
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE