

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JAMES BOANO, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, legally
uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ11953954
Riverside District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the “Findings and Award and Order” (F&A) issued on May 19, 2022, by the workers’ compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that while employed as a firefighter for defendant from May 1, 1993 to June 23, 2014, applicant sustained an industrial injury to various body parts, which resulted in applicant sustaining 32% permanent partial disability.

Applicant argues that defendant failed to prove that the prior awards of disability warranted reduction under Labor Code² section 4664(c).

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 Reconsideration, the Answer, and the contents of the WCJ’s Report. Based on our review of the record as our Decision After

¹ Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been substituted in her place.

² All future references are to the Labor Code unless noted.

Reconsideration, we will rescind the WCJ's May 19, 2022 F&A and return the matter to the trial level for further development of the record.

FACTS

Applicant worked as a firefighter, when he sustained an admitted cumulative industrial injury during the period ending on June 23, 2014, in the form of prostate cancer, erectile dysfunction, and urinary incontinence. (Minutes of Hearing and Summary of Evidence, March 16, 2022, p. 2, lines 8-11.)

This matter proceeded to trial primarily upon the issues of permanent disability and apportionment. (*Id.* at p. 3, lines 16-25.) The parties stipulated that the rating of the DEU was accurate, before consideration of section 4664(c). (*Id.* at p. 3, lines 3-5.)

The DEU rated applicant's permanent disability as follows:

URETHRA: 07.04.00.00 -30 -[1.4] 42 -490H -48 -54

REPRODUCTIVE SYSTEMS: 07.05.00.00 -28 -[1.4] 39 -490F -39 -45

54 C 45 = 75% FINAL PD

(DEU Rating, August 14, 2020.)

Applicant had two prior awards of disability while employed by defendant. (Defendant's Exhibits F and G.) The WCJ analyzed application of section 4664(c), in pertinent part, as follows:

The petitioner stipulates that the applicant had 2 prior awards that are subject to Labor Code 4664(c)(1)(G). These were awards for injuries to skin and abdomen fall into the same body system section.

The primary point of contention is whether there is apportionment pursuant to Labor Code Section 4664(c)(1)(G) with regard to ADJ2680011. The injuries resolved in that case included "cancer, smell/taste, left and right carpal tunnel, thought/memory, vertigo, voice speech, legs, neuropathy (upper and lower extremities) (See Exhibit F).

This WCJ took judicial notice of ADJ2680011, ADJ9554243, and ADJ9920071. Regarding ADJ2680011, the case settled by stipulations with request for award at 66% on 10/24/2012 and included Cancer, smell/taste, left and right carpal tunnel, thought/memory, vertigo, voice/speech, legs neuropathy of upper and lower extremities.

Stipulations with request for award in ADJ2680011, paragraph 9, subsection F, indicate that the parties "agree that the rating for the file is 66%, based on the medical reporting of Dr. Levister dated 06/01/2009 and 12/31/2009, Dr. Kent dated 04/17/2012, and Dr. Siambanes dated 05/19/2005 and 05/31/2016 (see attached

sheet for the breakdown of rating).” No attachment was made. It is a prior award pursuant to Labor Code 4664(b). It is conclusively presumed to exist at the time of a subsequent industrial injury. Dr. Levister found white blood cell disease. Dr. Kent found impairment based on smell/taste and hoarseness.

Dr. Levister’s report of 12/31/2019 rated as follows:
Abdomen-09.01.00.00-25[2]-29-490F-29-31

Dr. Ronald Kent’s report of 04/17/2022 rated as follows:
Smell/taste: 11.03.03.00-10[2]-11-490G-13-14
Voice: 11.03.04.00-5[2]-6-490I-9-10

These ratings for the injury of 05/24/1993-08/17/2006 (ADJ2680011) combine as follows: 31 C 14 C 10 = 47 (Opinion on Decision, page 8). These would fall into the catch all of Labor Code 4664(c)(1)(G).

The applicant had prior stipulation on ADJ9554243, to the abdomen of 12%. This would fall into the catch all of Labor Code 4664(c)(1)(G). There appears to be no contention here.

The applicant also had a stipulation of a rating of .75 (08.05.00.00-5-7-490H-10-12) = 9% for Skin in ADJ9920071 based on the reporting of Dr. Cindy Chen M.D report dated 04/29/2016. This rating has been confirmed and the applicant attorney and admitted in its trial brief and petition for reconsideration that the defendant would be allowed apportionment pursuant this case of 9% and to ADJ9554243, of 12%.

This WCJ added 47%, 12%, and 9%, the total being 68%. This represents the percentage of prior stipulations that fall within the catch all provision of Labor Code Section 4664(c)(1)(G). Since only 32% remain that would bring this case up to 100% allowable in the catch-all region, the impairment found after apportionment was 32%.

The petitioner relies on *Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223, WCAB *En Banc*. This was a case in which the WCAB found *En Banc*, that an order approving is not a prior award within the meaning of Labor Code Section 4664(b), medical reports and other evidence relating to a prior industrial injury settled by a compromise and release may be considered under section Labor Code 4663, and medical rehabilitation from a prior industrial disability remains viable under Labor Code section 4663 and it does not necessarily preclude a prior injury from being “other factor” causing the employee’s present disability.

The case appears inapplicable to the present case as it considered whether a compromise and release could be considered and award for purposed of Labor Code Section 4664(b). Here we have an award that is in contention.

The undersigned took judicial notice of the ADJ2680011, ADJ9554243, and ADJ9920071 cases. Application of Labor Code Section 4664(b) and Labor Code 4664(c)(1) lead to a deduction of the prior awards as reflected in the findings and award.

(WCJ's Report, pp. 3-4.)

DISCUSSION

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) 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 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

A decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Section 4664(c) states:

(c) (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

(A) Hearing.

- (B) Vision.
- (C) Mental and behavioral disorders.
- (D) The spine.
- (E) The upper extremities, including the shoulders.
- (F) The lower extremities, including the hip joints.
- (G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

In prior panel decisions, the Appeals Board has often taken a commonsense approach to assignment of disability to a body system, much like the WCJ has done here. (See e.g., *Jordan v. California Dep't of Corrections*, 2018 Cal. Wrk. Comp. P.D. LEXIS 243 [Wherein the panel, using the chapters of the AMA Guides, assigned cognitive impairment as a 'mental and behavioral' disability under subsection 4664(c)(1)(C), and not disability to the 'head' under 4664(c)(1)(G).].) However, upon further review, the issue of assignment of a disability to a body system is a medical issue over which a dispute exists, and the determination should be based on substantial medical evidence.

To constitute substantial evidence “. . . 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 v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

“[T]he medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters.” (*Peter Kiewit Sons v. I.A.C. (McLaughlin)* (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188] “[i]n a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation”].)

The requirement for expert medical evidence exists throughout workers compensation proceedings, including determination of temporary disability, permanent disability, apportionment, and causation of injury to name a few. (See also *Escobedo, supra*, [wherein the

Appeals Board required that apportionment under section 4663 be established by substantial medical evidence].)³

In many cases it may be apparent, even to the lay person, which body system is affected by a disability. In such cases, the parties may stipulate to body systems under section 4664(c). However, where the parties dispute the body system, such a dispute requires medical evidence, especially where there are issues outside the knowledge of a lay person required to decide the issue.

The requirements for proving application of section 4664(c) are essentially no different than apportionment under 4664(b):

First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable.

(Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal.App.4th 1099, 1115.)

In both 4664(b) and 4664(c), defendant is proving overlap. The difference between the two sections is that 4664(b) focuses on overlapping disability, whereas **4664(c) focuses on overlapping body systems, which are impacted by disability.** This is an important distinction. Disability as a result of an industrial injury is often conflated with injury to a body part(s). Here, the WCJ has decided application of section 4664(c) based upon the WCJ's perception of which body system was impacted by each disability. However, such findings should be supported by substantial medical evidence.

Where defendant seeks to apply section 4664(c), and there is a dispute, defendant must do the following:

- 1) Establish a prior award(s) of disability.

³ In the past application of section 4664(c) has been described as "apportionment." (*Gordon v. County of L.A.*, 2010 Cal. Wrk. Comp. P.D. LEXIS 581.) It has also been found that 4664(c) is not "apportionment." (*McGowan v. City of L.A.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 24.) The issue is one of semantics that does not affect the analysis. Accordingly, we will use the term 'application of section 4664(c)' throughout this opinion as referencing the process of calculating the application of section 4664(c).

- 2) Establish through expert medical evidence which body systems were impacted by the prior disability.
- 3) Establish a current award of disability.
- 4) Establish through expert medical evidence which body systems are impacted by the current disability.

If applicant's disability is found to span across multiple body systems, applicant is entitled to assign the disability to the body system that will achieve the highest rating.

The purpose of 4664(c) is to preclude accumulation of disability beyond 100% "with respect to any *one* region of the body." The overarching goal of rating permanent impairment is to achieve accuracy. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) It has consistently been held that where applicant's disability can be rated using multiple methods, applicant is entitled to the higher rating. (*Ogilvie v. Workers' Comp. Appeals Bd.*, 197 Cal.App.4th 1262, 1277 [permitting rebuttal of the rating schedule with alternative higher rating based upon diminished future earnings]; see also, *Grossmont Union High School District v. Workers' Comp. Appeals Bd. (Burns)* (1997) 62 Cal.Comp.Cases 687 [1997 Cal. Wrk. Comp. LEXIS 4483] (writ denied) [establishing dual-occupational rule, which allows for higher of two ratings when applicant's occupation spans two categories]; *Hartford Accident & Indemnity Company v. Workers' Comp. Appeals Bd. (Suttner)* (1990) 55 Cal.Comp.Cases 127 [1990 Cal. Wrk. Comp. LEXIS 2346] (writ denied); see also, *Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 506 [37 Cal.Comp.Cases 393]; *Weyerhaeuser Co. v. Workers' Comp. Appeals Bd. (Acosta)* (2003) 68 Cal.Comp.Cases 99 [*36] (writ den.).) We see no reason to deviate from prior logic.

Where a disability impacts multiple body systems, it may be assigned to either system, and it should be assigned to the body system that will generate the higher rating. (See e.g., *Serrano v. GMC*, 2013 Cal. Wrk. Comp. P.D. LEXIS 28 [Finding that 4664(c)(1) does not apply where fibromyalgia affected multiple body systems and not just applicant's upper extremities].) However, a finding of fact that a disability spans multiple body systems may only issue if such a finding is supported by substantial medical evidence. As we are clarifying this issue and the parties did not directly ask the evaluator in this case to address body systems under section 4664(c), we will return this matter to the trial level for further development of the record.

Accordingly, as our Decision After Reconsideration, we will rescind the WCJ's May 19, 2022 F&A and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award and Order issued on May 19, 2022 is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 16, 2026

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

**JAMES BOANO
WHITING, COTTER & HURLIMANN
STATE COMPENSATION INSURANCE FUND**

EDL/mt

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