WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DIANE PETERS, ***Applicant***

vs.

BANK OF AMERICA; ACE AMERICAN INSURANCE, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, ***Defendants***

Adjudication Numbers: ADJ9928089; ADJ10349796
Oakland 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.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 22, 2021

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

DIANE PETERS
LAW OFFICES OF DAVID KIZER
LAW OFFICES OF LENAHAN SLATER

pc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on March 1, 2021, defendant seeks reconsideration of the decision filed herein on February 9, 2021, in this case, which arises out of an injury, on April 2, 2012, to various parts of a 49-year-old bank loan officer. Petitioner, hereinafter defendant, contends in substance that I erred in concluding that applicant's injury resulted in permanent, total disability, rebutting the permanent disability rating schedule, without apportionment to nonindustrial causes or cumulative trauma. Applicant has filed an answer, supporting the findings and award. I will recommend that reconsideration be denied.

BACKGROUND

The factual history is summarized in the opinion, beginning with the injury, which took place when Ms. Peters

> tripped while entering a rest room whose threshold was missing. She fell forward, striking her left shoulder on the door jamb and landing on her knees and her outstretched left hand. Referred to an industrial clinic, applicant underwent conservative treatment and several diagnostic scans, and then began a series of surgical procedures. The first of these, on April 15, 2013, involved the left shoulder and included repair of a subscapular tear, distal clavicle resection (Mumford procedure) and subacromial decompression. This was followed by left elbow surgery, on February 14, 2014, consisting of a submuscular ulnar nerve transposition (SMUNT), lengthening of the flexor pronator and debridement and repair of the elbow. On April 21, 2014, Ms. Peters had an arthroscopic patellar chondroplasty on her right knee, followed by physical herapy and a series of injections to that knee. Applicant then underwent right elbow surgery, on October 10, 2014, reportedly debridement and repair. A repeat MRI of the right knee on April 21, 2015, revealed further pathology, and knee-replacement surgery was recommended but not approved. On December 20, 2015, as she was descending a staircase, applicant's right knee gave way and she fell down the stairs, fracturing her left fibula. Ms. Peters then had her right knee replacement, in April, 2016. She testified that she got a very poor result. After further scans, aspiration and more therapy, applicant underwent a revision of the arthroplasty, on September 11, 2018. In June, 2020, she had a fourth operation on the right knee that is not described in the medical records.
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> Prior to any of those surgical procedures, Ms. Peters did change jobs, leaving Bank of America for Summit Funding, where

she worked while studying for a NMLS[1] exam. She left to have her first shoulder surgery and they let her go.

Along the way, applicant developed a number of other problems that have been linked to the effects of her injuries and the treatment provided for them. Physically, she has been diagnosed with bilateral wrist strains, cervical strain with pathology found on imaging, lumbar strain also with pathology seen on MRI, and left knee strain with objective changes. Emotionally, pain, physical limitations and ultimately the ill effects of treatment measures caused anxiety, depression and sleep disturbance beginning fairly shortly after the original injury. Internally, applicant has been found to have diarrhea, constipation, heartburn, a sleep disorder, sexual dysfunction, and headaches; these problems were blamed on her injuries and the medications taken for their effects.

Also, during the course of this litigation, defendant Bank of America and its insurer filed a second application for adjudication of claim, alleging a second injury, cumulative in nature, over the last period of Ms. Peters's employment, a period that captures her work for Summit Funding as well as her last days at Bank of America.

The parties have engaged three medical-legal evaluators: Dr. Pramila Gupta, a neurologist (an agreed medical evaluator or AME), Dr. Richard Levy, an internal-medicine specialist, and Dr. Surender Punia, a psychiatrist (both qualified medical evaluators or QMEs). Together, they have authored eleven reports; Dr. Levy was deposed. Each party engaged a vocational evaluator, Tom Linder on applicant's behalf and Eugene Van de Bittner on defendant's.

The most recent report by the AME is dated January 28, 2020 (Exh. H).[2] There, she concludes, as she had in previous reports, that these injuries have become permanent and stationary, with residual impairment in several areas of the body, some of which she apportions between the two injuries. However, after outlining that apportionment (10% of some impairments to the cumulative claim), Dr. Gupta states:

> The examinee's specific injury and cumulative trauma resulting in permanent partial disabilities are intertwined

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[1] Nationwide Multistate Licensing System and Registry

[2] None of the medical-legal evaluators examined Ms. Peters or reported after her latest knee surgery in June, 2020. That operation is mentioned, but not described, in the report of Dr. Van de Bittner. Applicant testified that the reason for the procedure was that something was interfering with the prosthetic joint. There is no indication in the record whether the operation improved things, made them worse, or neither.

together and therefore, it is difficult to provide the exact apportionment among these injuries. Therefore, the examinee's current permanent partial disability would be due to the combination of a specific injury, as well as cumulative trauma.

The AME includes a section in her 2020 report on work restrictions. She would preclude applicant from overhead work, forceful pushing and pulling and repetitive work at or above shoulder level, on the basis of the left shoulder injury; from lifting more than ten pounds and repetitive movements of the elbows, for the bilateral elbow injury; from heavy lifting, repetitive bending and stooping for the lumbar injury; and from anything more than sedentary work with the use of a cane for the bilateral knee injury.

Dr. Punia, in his comprehensive evaluation of February 14, 2016, finds applicant's psychological condition permanent and stationary, with a GAF[3] score of 65,[4] equating to permanent impairment of 8%. Of this he apportions 90% to "physical claimed injury," 10% to "the continued Marijuana use." (Capitalization in the original) Dr. Punia does not appear to account for the fact that the marijuana use in this case was occasioned by the pain engendered by applicant's injuries. Two supplemental reports do not change those conclusions. (This QME's opinion that Ms. Peters has mild psychological impairment is contradicted by two treating physicians, Drs. David Green and Robert Boyd, who found her impairment moderate and moderate to severe, respectively.) (Exhs. 2, 3)

Dr. Levy's second comprehensive evaluation, dated May 4, 2018 (Exh. J), concludes with an impairment rating for headaches but defers on other internal-medicine impairments pending review of records generated since his first evaluation in 2015. In his supplemental report of October 21, 2018, he provides impairment ratings for heartburn, reduced sexual function and reduced sleep. (In some respects, this QME refers back to the conclusions outlined in his initial evaluation of October 23, 2015 (Exh. I). In some, the impairment rating rose slightly between the two examinations.) In terms of apportionment, Dr. Levy ascribes percentages of some impairments to pain, to "psychiatric aspects of the case" and to "the

[3] Global Assessment of Functioning. See *Schedule for Rating Permanent Disabilities* (PDRS), at pgs. 1-12 through 1-16.

[4] The QME states: "Based on the impairment alone the GAF is 70, based on her symptoms the GAF is 60. GAF of 65 (mean) is appropriate when there is this discrepancy." (Punctuation in the original) The doctor does not explain further. (Exh. A)

direct compensable internal medicine aspects of the case," which appear to include the effect of medications.[5] In his testimony, Dr. Levy appears to use an unusual (in workers' compensation) definition of cumulative trauma: The problems he is assessing, as an internal-medicine evaluator, stem from the cumulative effects of pain, medications, psychological ailments (the three aspects in this case), and thus "have a CT basis." This further appears to stem from the fact that Ms. Lewis had had, by the QME's count, seven surgical procedures and thus seven causative "injuries. So if all of these surgeries are related to one claim, then it would be easy." (Exh. L, pg. 35)

Mr. Linder concludes, in his report of April 29, 2020, that applicant is not amenable to vocational rehabilitation, whether in the form of applying transferrable skills, modified or alternative work, direct placement, on-the-job training, formal retraining, or self-employment, and that she was not "placeable" in a competitive job. This result he ascribes "100%" to "the direct result of her 4/02/12 specific work injury and her 01/09/14 cumulative injury." (Exh. 1)

Dr. Van de Bittner, on the other hand, believes Ms. Peters to be employable, giving such examples of available positions as cashiering and reception. In fact, he concludes that she has lost only 11% of her pre-injury earning capacity, or 15% if one considers the costs involved in searching for jobs. For this conclusion, this vocational expert employs a mathematical formula based on pre-injury earnings and those likely from the jobs he feels applicant can perform, aggregated over her projected working life. (Exh. O)

In the cumulative claim, applicant has elected to proceed against Bank of America.[6]

Following trial, I awarded 100% permanent disability, without apportionment to either the claim of cumulative injury filed by defendant or any nonindustrial causes. I relied in part on the opinions of the evaluating physicians and in part on those expressed by Mr. Linder.

DISCUSSION

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[5] In his deposition testimony, Dr. Levy adds a fourth divisor to the division of impairment based on sexual functioning: "To be fair, there probably should be four, which would be nonindustrial based on the reasonable medical probability that a postmenopausal female would have, many times, some – some sexual issues." (*Id*., pg. 40.) However, elsewhere (e.g., *id*., pg. 39) he states that there is no such history in this case.

[6] *See*, Section 5500.5. All statutory references not otherwise identified are to the Labor Code.

Defendant first contends that applicant's effort to rebut the rating schedule through the use of vocational evidence is unsuccessful, because Mr. Linder did not consider her ability to work outside her last job as a loan officer. As Ms. Peters points out in her answer, this is "simply not true." Mr. Linder in fact considered applicant's entire history in a variety of office positions (with more physically arduous employment eliminated by her physical injuries), concluding that time demands, upper-extremity requirements and the potential need to drive were prohibitive. Defendant argues that applicant has not rebutted the rating schedule essentially because Dr. Van de Bittner's conclusions are more thoroughly wrought than those of Mr. Linder, but I believe this fails to account for the fact that the former would purport to rebut the scheduled ratings, as well, by arriving at a percentage of lost earning capacity greatly at odds (lower) than the impairment reported by the evaluating doctors. Dr. Van de Bittner fails to explain this apparent anomaly, or to flesh out, generally, how an employee with significant restrictions in her physical abilities, as well as limitations imposed by her impairments (e.g., from difficulty sleeping), all of those can be more employable than the schedule would provide.

My rationale for relying on Mr. Linder's reporting is summed up in the opinion:

> Having heard applicant's testimony with an opportunity to observe her demeanor, and having found that testimony very credible, I believe the vocational conclusions reached by Mr. Linder more faithfully [adhere] to the medical reporting and the reality of Ms. Peters's condition than do those made by Dr. Van de Bittner. As stated above, the former finds that applicant's injuries, alone, have rendered her unable to benefit from vocational rehabilitation or to return to the workforce, while the latter pegs her loss of earning capacity at a considerably lower percentage than the disability ratings of the medical reports generated in this case. I must therefore conclude that Ms. Peters has successfully rebutted the PDRS.

Defendant next takes issue with the failure, in the decision, to apportion any permanent disability to its claim of cumulative trauma, or to nonindustrial causes. The rationale for these conclusions is expressed in the opinion:

Whether the disability in this case is partial or total, apportionment, including a division between the specific injury and the cumulative claim, will have to be considered. Thus, we begin with an assessment of that cumulative claim and whether any disability is properly ascribed to it.

In *Benson v. Wkrs. Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113], the court, in upholding the en banc decision of the appeals board in *Benson v. Permanente Medical Group* (2007) 72 Cal.Comp.Cases 1620, held that the permanent disability resulting from distinct work-related

injuries must be rated separately. Allowing "that there may be limited circumstances…when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability," the court nonetheless concluded that section 4663 now requires separate ratings for the permanent disability resulting from each injury.

The evaluating physicians in this case, beginning with Dr. Gupta, have ascribed some portion of applicant's medical problems to cumulative trauma through her last day of employment; Drs. Levy and Punia have largely deferred to the AME's assessment in this regard. Examining Dr. Gupta's 2020 report, she indicates that Ms. Peters suffered cumulative trauma to her left shoulder, elbow and wrist, her right knee and left fibula (because of the knee); in a derivative fashion, her low back stems from both injuries because of altered gait.

In assessing the validity of this apportionment, I have searched for indications of Dr. Gupta's understanding of applicant's work activities following her injury, both at Bank of America and at Summit Funding. Some of that understanding is taken from contemporaneous reporting by treating physicians. In her 2020 report, the AME states: "On July 10, 2012, Dr. Gunderson noted that she was doing her regular work which required a significant amount of typing and he believed that she was not making much progress because of it. She also reported that her knee pain had returned." On July 25, 2012, Dr. Gunderson reported that applicant had left her job and was looking for another one. (Ms. Lewis testified that she went to work at Summit in September, 2012.) On September 5, 2012, Dr. Gunderson imposed a limitation of 30 minutes of typing per hour. (Exh. H, pg. 4) No further notations appear to relate to employment prior to applicant's leaving work for good; that appears to have been on or before March 8, 2013. (Exh. S, pgs. 20, et seq.)

Perhaps that evidence is enough to establish a work-related injury. I am troubled, however, by several factors that point in the other direction. First, no physician was reporting at the time that work activities were making anything worse; the closest I see to such a conclusion is the first of Dr. Gunderson's entries summarized above, evincing his concern that typing at work was hampering her recovery from the fall. Second, the AME does not describe any particular work duty that was causing injury to any particular part of the body. Third, I see nothing in either of these jobs that looks capable of causing cumulative trauma to a knee, and Dr. Gupta has included the right knee (and, derivatively, the left fibula and low back) among the body parts cumulatively injured. Fourth, I was not able to identify any evidence that applicant had or complained of any symptoms or limitations relating to her work and its effect on her body over many years of work in financial institutions.[7] Finally, the

[7] The most thorough account of applicant's employment history in the record is found in the evaluation of Dr. Van de Bittner (Exh. O), where, at pages 55-56, he describes work in an insurance brokerage and several banks (World Savings,

medical records summarized by Dr. Gupta as well as applicant's testimony show clearly that Ms. Peters was heading for several operations before she returned to work after her fall. (Some of those procedures turned out poorly, resulting in some of the impairment derived from those results.[8])

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (appeals board en banc) (review den., 70 Cal.Comp.Cases 1506), the appeals board 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.
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> 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.[9]
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> 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.

Although compensability of the cumulative claim is not currently challenged, apportionment of permanent disability to that claim is a central topic, and I simply find the evidence of such apportionment weak, and overcome by the concerns enumerated above.

The apportionment Dr. Gupta ascribes to nonindustrial causes is in the knees, where she indicates that certain percentages are from underlying

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Wachovia and Wells Fargo, a series of merged banks, then Bank of America) from 1987 until 2007 and from 2009 until her injury in 2012.

[8] *See, Hikida v. Wkrs. Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679].

[9] A physician cannot make an arbitrary percentage finding simply because it is "fair" in a particular case. (Cf. Zemke v. Workmen's Comp. Appeals Bd., supra, 68 Cal.2d at pp. 798, 800 [33 Cal. Comp. Cases 358]; Berry v. Workmen's Comp. Appeals Bd., supra, 68 Cal.2d at pp. 790-791 [33 Cal. Comp. Cases 352]; Callahan v. Workers' Comp. Appeals Bd., supra, 85 Cal.App.3d at p. 630 [43 Cal. Comp. Cases 1097].)

degenerative changes.[[10]] However, most if not all of those changes were addressed in the operating room, where one knee was replaced and the other repaired.[11]

Moreover, Dr. Gupta concludes in her most recent report:

> The examinee's specific injury and cumulative trauma resulting in permanent partial disabilities are intertwined together and therefore, it is difficult to provide the exact apportionment among these injuries. Therefore, the examinee's current permanent partial disability would be due to the combination of a specific injury, as well as cumulative trauma.
> (Report of January 28, 2020, Exh. H, pg. 37)

Thus, the AME places this case within the exception noted by the court in Benson. (Defendant takes issue with this conclusion.)

As to Dr. Punia's apportionment of 10% of the psychological impairment to marijuana use, I did note that this was due to the effects of her injury, and as defendant points out Ms. Peters had obtained a medical marijuana card well before that, according to several references in the medical reporting. However, there is no evidence that she was using marijuana immediately prior to the injury, the record is replete with references to sleep problems brought about by pain, and the reports indicate that she uses marijuana to reduce her pain and help her sleep. That was her testimony, and as stated I found that testimony very credible.

The summation of the discussion of apportionment in the opinion is as follows:

> I have already described how I do not believe the apportionment determinations between the two claims on file that have been made by Dr. Gupta, primarily, do not rise to the level of substantial medical evidence by the standards enunciated by the courts in *Escobedo* and *Benson*. I have reached the same conclusion with respect to the opinions apportioning medical disability to nonindustrial causes. Simply put, I do not find that the doctors have adequately explained the "how and why" of their numbers. Of course, the first aspect of that analysis, regarding apportionment between the specific injury and the cumulative claim, is all that is

[10] Defendant implies (at page 7) that Dr. Gupta apportioned some shoulder impairment to preëxisting degeneration; it cites two portions of two of her reports, and it appears that the page citations are in error, as I was unable to find the references there. However, Dr. Gupta does not in fact ascribe any shoulder impairment to anything but industrial causes.

[11] *See, Hikida,* fn. 8. There is some possibility, discussed in the medical and vocational reporting, that Ms. Peters is a candidate for a left knee replacement, as well.

needed to address the conclusions reached by Mr. Linder, who feels that all of the vocational disability is industrial. The result can only be a finding of permanent, total disability.

RECOMMENDATION

I recommend that reconsideration be denied.

Dated: March 15, 2021

Respectfully submitted,
Christopher Miller
Workers' Compensation Judge