WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JERONIMO HEREDIA, ***Applicant***

vs.

TREASURY WINE ESTATES CORPORATION;
insured by SENTRY; ***Defendants***

Adjudication Number: ADJ10752261
Santa Rosa District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Treasury Wine Estates Americas, by and through its insurer, Sentry Insurance, seeks reconsideration of the December 1, 2020 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, Jeronimo Heredia, while employed as a fieldworker/agriculture on April 2, 2016, sustained an industrial injury to his low back, mid back, neck, left wrist, left shoulder, left elbow, groin, and low back with radiculopathy into the left leg and foot. The WCJ found that applicant is permanently totally disabled as a result of his industrial injury, and awarded him lifetime benefits at the rate of $361.88 per week and further medical treatment. The WCJ also found defendant failed to meet its burden of proof to establish apportionment of applicant's permanent disability.

Defendant contests the unapportioned award of 100% permanent disability, contending first that the vocational evidence the WCJ relied upon is not substantial evidence to support the finding that applicant is permanently totally disabled. Defendant further contends the WCJ erred in finding defendant failed to present substantial medical evidence to support apportionment.

We have received applicant's Answer to the Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration, recommending that the Petition be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the Answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of January 4, 2021, which considers, and

responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Findings and Award, and deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the December 1, 2020 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 22, 2021

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

JERONIMO HEREDIA
KNOPP PISTIOLAS
MULLEN & FILIPPI

SV/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant, Sentry, through their attorney of record Jeffrey Durra filed a timely, verified Petition for Reconsideration challenging the Findings and Award dated December 1, 2020.

Applicant suffered an industrial injury to his mid back, neck, left wrist, left shoulder, left elbow, groin, and low back with radiculopathy into the left leg and foot as a result of a specific injury on April 2, 2016 during the course of his employment as a field worker/agriculture for the employer, Treasury Wine Estates. The injury occurred when the applicant was shoveling mounds of grass and felt pain in his back progressing to his neck, left shoulder/arm and left lower extremity. (App. Exh. 7, Dr. Michael, 10/21/17.) He was age 54 on the date of injury.

In the F&A, the undersigned WCJ found that the Applicant's injury caused total permanent disability of 100% based on the opinion of the applicant's vocational expert, JeffMalmuth, M.A.

Petitioner contends:

a. The finding under Labor Code §4662(b) that applicant's injury caused total permanent disability of 100% (PTD) is not supported by the opinion of applicant's Vocational Rehabilitation (VR) expert Jeff Malmuth. *Petition, page 1, lines 16-18.*

b. The finding that defendants failed to meet its burden of proof on apportionment under Labor C_ode §4663 is in error. *Petition, page 1, lines 19-20.*

II

FACTS

On April 2, 2016, the applicant injured his mid back, neck, left wrist, left shoulder, left elbow, groin, and low back with radiculopathy into the left leg and foot while shoveling to clear grass, during the course of his employment as a field worker for Treasury Wine Estates. His initial diagnoses included lumbar muscle strain, lumbar radiculopathy, left groin muscle strain, right groin muscle strain, and thoracic spine strain. (Def. Exh. Dr. Chanson, 4/28/16.) The applicant

underwent conservative treatment including injections, physical therapy, chiropractic sessions and medication.

The applicant attended a Comprehensive Interdisciplinary Evaluation on November 20, 2019. Dr. Garavanian noted that the applicant has experienced a significant Joss of function due to the injury and ongoing chronic pain. His ability to perform activities of daily living has been significantly hindered. (App. Exh. 12, Dr. Garavanian, 11/20/19.) The applicant frequently requires assistance with getting dressed, self-care and personal hygiene. Due to his pain condition, he is wiable to go out with family and friends and go out for walks. Housework leads to pain and muscles spasms. (App. Exh. 12, Dr. Garavanian, 11/20/19.) He is currently unable to work due to pain and disability. (Id.)

Diane Michael, M.D. was utilized as the Qualified Medical Evaluator. In her evaluating report on September 14, 2018, she issued the following whole person impairments (WPI); 8% for the cervical spine; 5% for the lumbar spine; 6% for the left hand/wrist and 9% for the left shoulder. (App. Exh. 6, Dr. Michael, 9/24/18.) Dr. Michael apportioned 10% of the cervical and lumbar impairment to pre-existing factors demonstrated on MRI's. (Id.) She noted that the applicant is medicating every 3-4 hours on a daily basis for depression, pain, sleep, and gastrointestinal symptoms. (App. Exh. 5, Dr. Michael, 11/29/19.) The applicant has routinely used a cane since 2017. (App. Exh. 7, Dr. Michael, 10/21/17.) An opinion on work restrictions was deferred to the primary treating physician, Gary Martinovsky, M.D.

On January 30, 2020, Dr. Martinovsky imposed the following work restrictions: 1.) no lifting or carrying over 10 pounds; 2) no pushing or pulling over 15 pounds; 3) no repetitive bending, stooping, crouching, crawling or kneeling; 4) no standing for longer than 15 minutes at the (sic) time; 5) no climbing; and 6) no walking on uneven surface. (App. Exh. 9, Dr. Martinovsky, 4/2/20, 1/30/20.) Applicant's credible trial testimony further supports the work limitations.

At trial, applicant testified in substance as follows. He is currently experiencing symptoms in his hand, shoulder, entire back, low back, entire left leg, neck, groin, and ribs. (MOH/SOE, p. 8, lines 20-22.) His pain in his left shoulder renders it difficult to use his arm. (MOH/SOE, p. 8, lines 34-35.) When he holds something with his hand, he experiences pain and numbness in his left wrist and hand. (MOH/SOE, p. 8, lines 36-37.) The numbness in his hand is always there, making it difficult to grip things. (MOH/SOE, p. 8, lines 43-44.)

The applicant has pain in his left leg that travels down the entire leg, and it is . always numb. He needs to constantly move. (MOH/SOE, p. 8, lines 44-45.) It is very difficult for him to lift anything from the ground due to his low back pain. (MOH/SOE, p. 9, lines 8-9.) The most he can lift is about 5 pounds. (MOH/SOE, p. 9, lines 9-10.) Currently, the applicant uses a cane to walk.

(MOH/SOE, p. 9, line 16.) Dr. Martinovsky originally recommended use of a cane when he saw how difficult it was for the applicant to walk. (MOH/SOE, p. 9, lines 20-21.)

Applicant has difficulty in the bathroom using the toilet because he needs to hold onto something with one hand. (MOH/SOE, p. 9, lines 33-34.) He has difficulty in the kitchen preparing food and doing the dishes. He has burned or cut his left hand because he can't control it very well. (MOH/SOE, p. 9, lines 32-36.) When the applicant takes pain medication, he needs to lie down so his body can relax. (MOH/SOE, p. 10, lines 18- 19.)

Applicant stopped working on either May 13 or 14 of 2016 when he was taken off work by Dr. Chanson. (MOH/SOE, p. 10, lines 24-26.) The applicant has testified that he has not looked for work since 2015 because the pain in his body "doesn't allow him to do much". He has always done heavy work. (MOH/SOE, p. 10, lines 28-30.) He would like to work if possible. (MOH/SOE, p. 10, lines 34-35.)

The applicant was evaluated by two vocational experts, Jeff Malmuth as the applicant's expert and Emily Tincher as the defendant's expert. Mr. Malmuth opined that solely due to the effects of the industrial injury, Mr. Heredia has sustained a I 00% loss of his future earning capacity and labor market access and is not amenable to rehabilitation at this time. (App. Exh. 3, JeffMalmuth, 6/11/20.)

Ms. Tincher, on the other hand, concluded that the applicant is amenable to vocational rehabilitation and could perform jobs if it were not for his significant educational deficits and English illiteracy and the applicant has a lack of motivation or ability to tolerate or pursue vocational rehabilitation based on the combination of these nonindustrial factors. (Def. Exh. N, Emily Tincher, M.S., 10/18/19.)

This matter was tried on the issues of: parts of body injured, permanent disability, apportionment, need for further medical treatment, self-procured medical treatment, attorneys fees, and the lien of Employment Development Department.

An F&A issued finding that the strict AMA Guides rating had been rebutted and Applicant's injury caused total permanent disability of 100% based on the opinion of the Applicant's vocational expert, Jeff Malmuth, M.A.

It is from this Findings and Award that petitioner seeks reconsideration.

III

DISCUSSION

A. THE OPINION OF THE APPLICANT'S VOCATIONAL EXPERT, JEFF MALMUTH, IS SUBSTANTIAL EVIDENCE TO SUPPORT PERMANENT TOTAL DISABILITY.

Labor Code §4660(a) states that "in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity".

The scheduled rating is 'prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule'. (Labor Code §4660(c).) In *Oglivie*, the Court of Appeals held that there are three permissible methods by which the schedule rating could be rebutted. (*Oglivie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4t11.) First, an employee can rebut the scheduled rating by showing a factual error in the application of a formula or the preparation of the schedule. Second, the employee can show the injury impairs his or her rehabilitation, and for that reason, the employee's diminished future earnings capacity is greater than reflected in the employee's scheduled rating. Third, an employee can show that the severity of the claimant's injury is not captured within the sampling of the disabled workers that was used to compute the adjustment factor. (*Id.*)

Here, petitioner relies on the holding in *Contra Costa County v. WCAB* (*Dahl*) to discredit the reporting of Mr. Malmuth, the same vocational expert utilized by the applicant in Dahl. (*Contra Costa County v. WCAB* (*Dahl*) (2015)80 CCC 1119.) Specifically, the petitioner asserts that Mr. Malmuth's opinion and method of determining the applicant is not feasible for vocational rehabilitation is not consistent with methods recognized by the Ogilvie/Dahl decisions. (Petition, p. 7, lines 18-20.) However, the facts in *Dahl* are distinguishable to the present case.

In *Dahl*, the applicant failed to rebut the scheduled rating by showing that her injury precluded vocational rehabilitation, The Court of Appeals found that Mr. Malmuth's failure to provide an individualized assessment of whether industrial factors precluded the employee's rehabilitation was not sanctioned by the *Ogilvie* court. Additionally, Mr. Malmuth testified that even with the applicant's injury, she could perform certain jobs without retraining and agreed that the applicant was a good rehabilitation candidate. (*Contra Costa County v. Workers' Comp. Appeals Bd*., 240 Cal. App. 4th 746.) Mr. Malmuth held no such opinion in the present case.

Here, unlike in *Dahl*, Mr. Malmuth expressly performed an individualized vocational evaluation of the applicant, including his job duties, work related skills, and the applicant's actual ability to be considered by an employer hired, and ultimately employed in a competitive work environment considering

medically imposed functional limitations. (App. Exh. 3, Mr. Malmuth, 6/11/19.) Based on this individual assessment, Mr. Malmuth concluded that 'from a perspective, the combination of Mr. Heredia's functional limitations will prevent him from being able to maintain the necessary pace and persistence on a regular basis, and not just sporadically, that is essential in the performance of unskilled work'. (Id.)

Additionally, the medical evaluator in *Dahl* did not provide any formal work restrictions. Conversely, here, the primary treating physician, Dr. Martinovsky imposed the following work restrictions: 1) no lifting or carrying over 10 pounds; 2) no pushing or pulling over 15 pounds; 3) no repetitive bending, stooping, crouching, crawling or kneeling; 4) no standing fo.r longer than 15 minutes at the (sic) time; 5) no climbing; and 6) no walking on uneven surface. (App. Exh. 9, Dr. Martinovsky, 4/2/20, 1/30/20.) In addition to the formal work restrictions, the medical reports evince that the applicant is currently at a sub-sedentary level of functional capacity and is unable to work due to pain and disability. (App. Exh. 12, Dr. Garavanian, 1 i/20/19.) These medically imposed restrictions, notably absent in *Dahl*, lend further credence to Mr. Malmuth's conclusions.

Petitioner alleges that Mr. Malmuth never said applicant was not amenable. (Petition p. 9, lines 9-11.) Even a cursory review of the evidentiary record contradicts petitioner's claim.

As recited in the Opinion on Decision, Mr. Malmuth writes,

> "Due to his profoundly debilitating functional limitations Mr. Heredia would require significant vocational adjustment in terms of tools, work processes, work settings, or industry in the unlikely event he was able (sic) *amenable to vocational rehabilitation* which, in my opinion he is not."
> (App. Exh. 3. Mr. Malmuth, 6/11/19.)(emphasis added)

Later in that same report, Mr. Malmuth reiterates,

> "It is therefore my vocational opinion that Mr. Heredia is not feasible for vocational rehabilitation or *amenable for rehabilitation* for the purpose of returning to competitive employment, leading to my opinion that he is not employable, and has therefore sustained a total loss of earning capacity at this time."
> (App. Exh. 3, Mr. Malmuth, 6/11/19.)(emphasis added)

Regardless, contrary to petitioner's assertion, Mr. Malmuth's use of the term 'impaired amenability' does not, by itself, lessen the probative value of his reports. Instead, reliance is placed on Mr. Malmuth's comprehensive evaluation,

which was consistent with the limitations imposed by Dr. Martinovsky and the applicant's credible testimony at trial.

Petitioner asserts, without evidence, that Mr. Malmuth inferred that just because applicant is a field worker, Group 491, that he has no transferable skills. (Petition p. 8, lines 8-9.) This perfunctory argument is unpersuasive. The finding that applicant has no transferable skills is not merely based on a job title, or an occupational group number prescribed by the 2005 Permanent Disability Rating Schedule. Instead, Mr. Malmuth extensively evaluated the applicant's past vocational history of labor intensive-physically demanding unskilled and low-skilled work, especially the applicant's last 15 years as a vineyard laborer, to find that the applicant possessed no relevant transferable or marketable skills. (App. Exh. 3, Mr. Malmuth, 6/11/19.)

In *Ogilvie,* the court concluded the LeBoeuf approach was limited to cases "where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education." (*Ogilvie v. Workers' Comp. 'Appeals Bd* (2011) 197 Cal. App, 4th.)

Unlike in *Dahl,* here, there is ample evidence that the applicant's industrial injuries have rendered him incapable of rehabilitation. Mr. Malmuth persuasively opines that applicant is unemployable, has a total loss of earning capacity, and is not amendable to retraining due to the industrial injury. (App. Exh. 3, Jeff Malmuth, 6/11/19.) It is important to note that the applicant's illiteracy or a lack of English language skills did not prevent or even impede the applicant's successful 15-year career as a laborer with the same employer. Even the petitioner recognizes that the applicant has a long track record of being a dependable employee. (Petition p. 8, line 14.) In fact, it was only after suffering an industrial injury that the applicant could no longer physically perform the requisite job duties of a vineyard laborer.

B. THE OPINION OF DEFENDANT'S VOCATIONAL EXPERT, EMILY TINCHNER DOES NOT CONSTITUTE SUBSTANTIAL EVIDENCE.

Like medical reports, a vocational expert's report can support an award only if it is found to be substantial evidence. Here, Ms. Tincher found that the applicant is able to perform a full range of sedentary and light work and has sufficient functional capacity to be feasible for and benefit from vocational rehabilitation. (Def. Exh. N, Emily Tincher, 10/18/19.) However, this court finds her report is replete with assumptions contradicted by the evidentiary record.

Where the evaluating physicians do not conclude that an injured employee is permanently and totally disabled, an opinion offered by a vocational

rehabilitation expert to support such a finding must be based on medically substantiated limitations said to be producing the disability. (*Navarro v. Workers' Comp. Appeals Bd.* (2016) 81 Cal. Comp. Cases 291 (writ den.).)

Ms. Tincher identified both sedentary and light occupations, unrelated to any of his prior jobs, that the applicant would be physically capable of performing. (Def. Exh. N, Emily Tincher, M.S., 10/18/19.) The Dictionary of Occupational Titles, cited by both Mr. Malmuth and Ms. Tincher, classifies "light work" as the capacity to lift, carry, push and pull 20 pounds occasionally and 10 pounds frequently; standing and/or walking up to 213rd of an 8 hour day; and sitting up to 113rd of an 8-hour day.

Ms. Tincher seemingly ignores that the applicant's functional limitations, as set forth by PTP Dr. Martinovsky, renders him unable to perform a full range of light work. The work restriction of no lifting or carrying over 10 pounds, alone, eradicates any job classified as light. (App. Exh. 9, Dr, Martinovsky, 4/2/20, 1/30/20.) Even a sedentary job is in excess of Dr. Garavanian's opinion that the applicant is presently at a sub-sedentary level of functional capacity. (App. Exh. 12, Dr. Garavanian, 11/20/19.)

Ms, Tincher's claim that the applicant "appears to be functioning quite well" with regard to activities of daily living (ADL) greatly overestimates applicant's ability to function and is inconsistent with the record. (Def, Exh. N, Emily Tincher, 10/18/19.) As confirmed by his trial testimony, the applicant's ability to perform activities of daily living has been significantly hindered and leads to increased pain and daily use of medication. (App. Exh. 12, Dr. Garavanian, 11/20/19.) He struggles with getting dressed, self-care and personal hygiene. (App. Exh. 12, Dr. Garavanian, 11/20/19.) He requires assistance with putting his socks and shoes on. Due to his pain condition, he is unable to go out witl1 family and friends and go out for walks. (App. Exh. 12, Dr. Garavanian, 11/20/19.) The applicant credibly testified that he needs to constantly move around. He can stand about a half an hour or up to an hour, but he cam10t sit still. (MOH/SOE, p. 24- 26.)

Defendant has failed to provide sub rosa videos or any other evidence that would contradict or impeach applicant's credible testimony as to the level of his daily pain and its impact on his ability to function.

Lastly, Ms. Tincher stated '"when the nonindustrial factors are combined, the synergistic effect results in Mr. Heredia having a lack of motivation or ability to tolerate or pursue vocational rehabilitation," (Def. Exh. N, Ms. Tincher, 10/18/19.) The comi finds no merit in this broad assertion. Having the opportunity to observe the applicant's demeanor during trial, the applicant is found to be a credible witness. Based on his testimony, there is no reason to assU111e that he is unmotivated to return to some type of work or is intent on permanently withdrawing from the labor market, as confirmed by Dr.

Garavanian. (App. Exh. 12, Dr. Garavanian, 11/20/19.) Absent elaboration by Ms. Tincher, it is entirely speculative to conclude that the applicant is unmotivated to secure gainful employment merely because of 'non-industrial factors'.

C. THE APPORTIONMENT OPINION OF DR. MICHAEL DOES NOT CONSTITUTE SUBSTANTIAL MEDICAL EVIDENCE.

It is well settled that in order to constitute substantial evidence a medical opinion must be predicated on medical probability and is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories, or examination on incorrect legal theories, or on surmise, speculation, conjecture or guess. (*Escobedo v. CNA Insurance Company* (2005) 70 Cal. Comp. Cases 604, 613.) A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Milpitas Unified School District v. WCAB* (Guzman) (2010) 75 Cal. Comp. Cases 837.)

Regarding apportionment, Dr. Michael renders the following opinion, "Apportionment is not an exact science but it is with reasonable medical probability the cervical and lumbar impairment is 10% apportionment to pre-existing factors demonstrated on MRIs." (App. Exh. 6, Dr. Michael, 9/14/18.) Dr. Michael's superficial opinion does not meet defendant's burden of proof to justify apportionment.

Petitioner argues that the QME opinion on apportionment was adequate and should be followed. (Petition, p. 10, lines 5-6,) In support of their claim, the petitioner recites the lumbar spine MRI findings and argues that these factors contribute to put applicant into DRE II category for a lumbar impairment and therefore should be apportioned. (Petition p. 10, lines 6-24.) However, this argument is misplaced.

The mere narration of the pre-existing MRI findings does not bolster or strengthen Dr. Michael's insufficient apportionment opinion. The presence of pre-existing factors are not in dispute. Instead, the proper inquiry is whether the doctor sufficiently explained and supported the rationale behind her conclusion. As here, if a physician opines that 10% of an applicant's back disability is caused by pre-existing factors, the physician must explain the nature of the disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 10% of the disability. (*Escobedo v. Marshalls* (2005) 70 CCC 604, 622 (appeals board en bane).)

While it is not disputed that valid apportionment must be applied to a finding of 100% PTD, the apportionment must constitute substantial medical evidence. Here, that was not done.

After a careful review of the record as a whole, it is based on Mr. Malmuth's reporting, which this court finds substantial, coupled with work restrictions and the applicant's credible and unrebutted testimony, that the applicant is permanent and total. There is nothing in defendant's petition to disrupt that schedule was rebutted and the applicant is 100% permanently disabled.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: January 4, 2021
Katie F. Boriolo
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE