WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LAWRENCE SALDANA, ***Applicant***

vs.

CA DEPARTMENT OF CORRECTIONS
AND REHABILITATION, legally uninsured, adjusted by
STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Numbers: ADJ4050214 (VNO0525007);
ADJ2214141; ADJ808335
Van Nuys 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/ KATHERINE A. ZALEWSKI, CHAIR________

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2021

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

LAWRENCE SALDANA
LAW OFFICES OF ROWEN, GURVEY & WIN
STATE COMPENSATION INSURANCE FUND

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

This matter involves three injuries dating back to 2004 and 2005. The parties have selected Agreed Medical Examiners (AMEs) in orthopedics and internal medicine, and a Qualified Medical Examiner (QME) in psychiatry. Timothy Reynolds, M.D. has acted as the internal medicine AME on this case for more than 15 years, has evaluated the applicant on multiple occasions, and has opined that the applicant has industrial fibromyalgia manifesting in pain and sleep dysfunction. In a Findings of Fact and Award served on March 29, 2021, the court found that the reporting of the AME in internal medicine constituted substantial medical evidence, including a rating of the fibromyalgia by analogy to sleep disorder. Defendant is aggrieved by this finding, and in a timely, verified Petition for Reconsideration dated April 19, 2021 avers the conclusions of Dr. Reynolds assigning fibromyalgia by analogy to sleep dysfunction do not constitute substantial medical evidence because there is no documented sleep study in the record to support the Class II sleep and arousal disorder.

This Report recommends denial of the petition. The findings of the AME appropriately identify an industrially related condition in applicant's fibromyalgia, which is not directly ratable under the AMA Guides 5th Edition. The AME thus rates the applicant's impairment by analogy, and reasonably explains the basis for doing so. Moreover, there is an extensive history of 15 years of consistent medical-legal examinations and findings of pervasive sleep disturbance across multiple specialties. For these reasons, the record provides substantial evidence of sleep impairment.

The matter is not presently on calendar.

II.
FACTS

In ADJ2214141 (designated as the master file in EAMS), applicant Lawrence Saldana, while employed during the Cumulative Trauma period November 11, 2003, through January 7, 2005, as a State Parole Agent I, occupational group number 490, at Riverside, California by the California Department of Corrections and Rehabilitation, legally uninsured, adjusted by State Compensation Insurance Fund, sustained injury arising out of and in the course of employment to the nervous system/psyche.

In ADJ4050214, applicant Lawrence Saldana, while employed on November 11, 2004, as a State Parole Agent I, occupational group number 490, at Riverside, California by the California Department of Corrections and Rehabilitation, legally uninsured, adjusted by State Compensation Insurance Fund, sustained injury arising out of and in the course of employment to the neck, bilateral elbows, bilateral shoulders, lumbar spine, psyche, sleep disorder, and arousal disorder, and claims to have sustained injury to the wrists, gastritis, fatigue, and erectile dysfunction.

The parties have selected Agreed Medical Examiner (AME) Peter Newton, M.D. in orthopedics,

AME Timothy Reynolds, M.D. in internal medicine, and Qualified Medical Examiner (QME) Gregory Cohen, M.D. in psychiatry. The medical-legal evaluators have identified industrial causation, permanent disability and both medical and legal apportionment.

The matter was heard in trial proceedings on February 10, 2021. A number of issues relating to the nature and extent of the claimed injuries were framed for decision, and applicant's testimony adduced under direct and cross-examination. The matter was submitted for decision the same day. The parties requested and were granted time in which to submit trial briefs, which were read and considered.

A Joint Findings of Fact and Award was served on March 29, 2021. Therein, it was determined that the applicant had sustained permanent and total disability, and a corresponding award with attorney fees was entered. Although the Finding of Fact and Award addressed multiple issues raised at trial, the sole issue raised in defendant's Petition for Reconsideration is whether the sleep impairment identified by AME Dr. Reynolds is substantial medical evidence. Defendant submits that because the sleep impairment is not supported by polysomnography as "expected" by the AMA Guides, the resulting assessment of sleep impairment identified by Dr. Reynolds is not substantial medical evidence.

III.
DISCUSSION

The issue at bar is whether the assessment of 20% Whole Person Impairment for fibromyalgia, rated by analogy to sleep disorder, can be substantial medical evidence in the absence of confirming polysomnography. Defendant avers that irrespective of whether the sleep impairment is assessed based on pathology or is rated by analogy, the finding of a Class II impairment must be supported by a sleep study.

Labor Code § 4660 provides that "the nature of the physical injury or disfigurement shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)." However, the AMA Guides cannot provide for every possible diagnosis and disability:

> The Guides itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. The authors repeatedly caution that notwithstanding its "framework for evaluating new or complex conditions," the "range, evolution, and discovery of new medical conditions" preclude ratings for every possible impairment. (Guides, § 1.5, p. 11.) The Guides ratings do provide a standardized basis for reporting the degree of impairment, but those are "consensus-derived estimates," and some of the given percentages are supported by only limited research data. (Guides, pp. 4, 5.) *The Guides also cannot rate syndromes that are "poorly understood and are manifested only by subjective symptoms."* (*Ibid*.)

> To accommodate those complex or extraordinary cases, the Guides calls for the physician's exercise of clinical judgment to assess the impairment most accurately. Indeed, throughout the Guides the authors emphasize the necessity of "considerable medical expertise and judgment," as well as an understanding of the physical demands placed on the particular patient. (Guides, p. 18.) "The physician must use the entire range of clinical skill and judgment when assessing whether or not the measurements or tests results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the physician may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing." (Guides, p. 19.) The PDRS itself instructs physicians that if a particular impairment is not addressed by the AMA Guides, they "should use clinical judgment, comparing measurable impairment resulting from the unlisted objective medical condition to measurable impairment resulting from similar objective medical conditions with similar impairment of function in performing activities of daily living." (PDRS, p. 1-4.)[1]

Thus, where a condition or diagnosis is not addressed in the AMA Guides, the evaluating physician may use their clinical judgement to find analogous impairment from within the guides, especially where the syndrome in question is poorly understood and manifests with subjective symptoms. Moreover, the California Court of Appeal has specifically rejected the contention that reform legislation bars impairment arising out of pain without objective factors not otherwise specified in the AMA Guides:

> As the Sixth District found in *Milpitas Unified*, however, if the Legislature had intended to require such an approach to the determination of permanent disability, "it would have used different terminology to compel strict adherence to th[e] criteria [in the AMA Guides] for every condition." (Milpitas Unified, supra, 187 Cal.App.4th at p. 822.) Instead, the Legislature provided only that "the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments… ."(§ 4660, subd. (b)(1), italics added.)[2]

[1] *Milpitas Unified Sch. Dist. v. Workers' Comp. Appeals Bd.,* 187 Cal. App. 4th 808, 823-24, 115 Cal. Rptr. 3d 112, 122-23 (2010), *emphasis added.*

[2] *City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon),* 222 Cal. App. 4th 1360, 1371-72, 167 Cal. Rptr. 3d 1, 7-8.

Here, AME Dr. Reynolds has diagnosed industrial fibromyalgia, a condition not addressed in the AMA Guides. Dr. Reynolds describes ratable impairment as follows:

> Mr. Saldana's fibromyalgia syndrome is characterized by widespread pain and fatigue.
>
> Based on my judgment and experience the widespread pain component of his fibromyalgia syndrome is subsumed within Dr. Newton's impairment ratings for widespread orthopedic conditions.
>
> However, the fatigue component of Mr. Saldana's fibromyalgia syndrome qualifies as Class 2 rating for sleep and arousal disorders according to Table 1-3- 4 on page 317 of the AMA Guides, amounting to 20% impairment of the whole person because of the frequency and severity of his symptoms, because of his responses on the Epworth and Fatigue Symptom Inventory (FSI) questionnaires attached to my report, and because of his OSA [Obstructive Sleep Apnea].[3]

Dr. Reynolds also apportions the sleep impairment between industrial factors and preexisting nonindustrial factors, including nonindustrial obstructive sleep apnea.

Defendant's Petition for Reconsideration argues that the lack of a sleep study invalidates the assessment of sleep impairment. As defendant correctly points out, the AMA Guides at p.317 notes that it is expected that a "diagnosis of excessive daytime sleepiness has been supported by formal sleep studies in a sleep laboratory."

However, the undersigned would respectfully submit that Dr. Reynolds' opinions are supported in the extensive record of multi-specialty medical-legal evaluations, diagnosis of nonindustrial sleep apnea with a prescription sleep appliance, and consistent reporting from the applicant. As far back as 2006, applicant complained of severely interrupted sleep, with the applicant resorting to taking naps during his lunch break until he stopped working in 2005. At the time of the initial evaluation with Dr. Reynolds in 2006, the applicant was sleeping "one to three hours per night with interruptions and naps off and on throughout the day."[4] This echoes the applicant's reporting to orthopedic AME Dr. Peter Newton, who noted ongoing sleep disturbance dated back to at least 2002.[5] The applicant further reported marked disturbance of" sleep initiation and maintenance" to prior psychiatric AME Dr. David Freeman in 2009, by which time the applicant had been issued a CPAP machine and diagnosed with chronic obstructive sleep apnea.[6]

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[3] Ex. 6, October 1, 2019 report of internal medicine Agreed Medical Examiner Timothy Reynolds, M. D.

[4] Ex. 13, October 25, 2006 report of internal medicine AME Timothy Reynolds, M.D. at p.4.

[5] Ex. 5, August 6, 2006 report of orthopedic AME Peter Newton, M.D. at p.4.

[6] Ex. 15, March 18, 2020 report of psychiatric QME Gregory Cohen, M.D. at p.14.

The applicant's complaints of significant sleep disturbance, usage of the CPAP machine, and daytime somnolence continue throughout the 15 years of medical-legal evaluations on record. The applicant's struggles with sleep and daytime somnolence are documented most recently in the 2019 reporting of Dr. Reynolds:

> Regarding sleep, Mr. Saldana falls asleep on the couch at about 11:00 p.m. He awakens at about 1:00 a.m. and goes to his bed where he applies a continuous positive airway pressure (CPAP) device and falls asleep for four hours without interruption. He usually awakens at 5:00 a.m. and is sometimes able to go back to sleep for an additional hour.
>
> Mr. Saldana explained that he is a light sleeper. He is easily awakened by noises. Also, he has "very disturbing, frustrating" dreams at times. He usually feels refreshed upon immediately awakening in the morning. Then, he feels fatigued after he and his dog take a morning walk. When he feels "extremely fatigued" he takes a one-hour nap; this occurs about two days per week. Sometimes he falls asleep briefly during quiet times.
>
> Mr. Saldana filled out the Fatigue Symptom Inventory (FSI) questionnaire in my office. On a scale of 0 (not at all fatigued) to 10 (as fatigued as he could be) he indicated that he experienced 9/10 fatigue on his most fatigued day during the past week, and 5/10 fatigue during the least fatigued day. His average fatigue was 7/10 during the past week. He indicated that he was experiencing 8/10 fatigue on the day of his examination in my office.
>
> In the FSI, on a scale of 0 (no interference) to 10 (extreme interference) Mr. Saldana indicated that his fatigue resulted in 8/10 interference with his general level of activity, 8/10 interference with his ability to bathe and dress, and 8/10 interference with his ability to work outside the home and perform housework. He indicated that his fatigue caused 9/10 interference with his ability to concentrate, 10/10 interference with his ability to relate with other people, 10/10 interference with his ability to enjoy life, and 8/10 interference with his mood. He indicated that he felt fatigued seven out of seven days during the previous week. He said that there was no consistent daily pattern to his fatigue.

Similar findings are documented in the final reporting of orthopedic AME Dr. Newton[7] and psychiatry QME Dr. Cohen.[8] The evidentiary record thus provides some 15 years of reporting of sleep disturbance, daytime somnolence, and consistent medical-legal findings of corresponding impairment. Additional evidence for sleep dysfunction can be found in the applicant's Epworth score, and more than ten years of using a prescribed sleep appliance (CPAP machine).

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[7] Ex. 3, July 16, 2019 report of orthopedic AME Peter Newton, M.D. at pp, 2-5, 7. "The applicant states that he experiences sleep disturbances. He cites an average of 4 hours of sleep each night secondary to the physical pain."

[8] Ex. 15, March 18, 2020 report of psychiatric QME Gregory Cohen, M.D. at p.7.

Moreover, Dr. Reynolds has been the parties' chosen AME for more than 15 years, and has evaluated the applicant and authored multiple medical-legal reports. It is presumed that that the agreed medical evaluator was chosen by the parties because of his expertise and neutrality. "[W]orkers' compensation law favors agreed medical [evaluators] in resolving medical disputes fairly and expeditiously."[9] Therefore, an agreed medical evaluator's opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive.[10] It is further noted that the defendant has consistently declined to challenge any of the AME opinions regarding sleep impairment via cross-examination of the AME or by request for supplemental reporting.

Here, the internal medicine evaluator selected by both parties has provided more than 15 years of consistent medical-legal reporting documenting the applicant's significant sleep dysfunction, with those findings further confirmed in the diagnosis of nonindustrial obstructive sleep apnea and the issuance of corresponding medical appliance. The history provided by Dr. Reynolds is echoed in the reporting of the orthopedic and psychiatric medical-legal evaluators. The record as a whole thus provides a consistent, documented history of sleep dysfunction, treatment, and disability. The undersigned would respectfully submit that the March 26, 2021 opinion does not "disregard, retreat from, or compromise the requirement of substantial evidence," and that is was appropriate to allow AME Dr. Reynolds to use his clinical judgment in applying the Guides.[11]

IV.
RECOMMENDATION

It is respectfully recommended that the defendant's April 19, 2021 Petition for Reconsideration be denied.

Dated: April 26, 2021

SHILOH RASMUSSON
Workers' Compensation Administrative Law Judge

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[9] *Green v. Workers' Comp. Appeals Bd.* (2005) 127 Ca l.App.4th 1426, 1444 (70 Cal. Comp. Cases 294).

[10] *Power v. Workers Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 (51 Cal. Comp. Cases 114); *Los Angeles Unified School Dist. v. Workers' Comp. Appeals Bd.* (Steele, (2000) 65 Cal. Comp. Cases 300, 301 (writ denied); *Siqueiros v. Workers' Comp. Appeals Bd.* (1995) 60 Cal. Comp. Cases 150, 151 (wit denied).

[11] *Milpitas Unified Sch. Dist. v. Workers' Compensation Appeals Bd. (Guzman)* (2010) 187 Cal. App. 4th 808, 75 Cal. Comp. Cases 837, 851.