WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STELLA ALDAMA, *Applicant*

vs.

STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION, legally uninsured; administered by STATE COMPENSATION INSURANCE FUND - STATE CONTRACT SERVICES, *Defendants*

Adjudication Number: ADJ11213667
Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on March 17, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her ears/hearing, neck, upper back, hands, heart/hypertension, kidneys/chronic kidney disease, lower back, hips, knees, feet, and in the form of GERD, asthma, and sleep disorder, that applicant did not sustain injury AOE/COE in the form of diabetes, and that the injury caused 50% permanent disability.

Applicant contends that her permanent disability rating should include separate impairment ratings for her chronic kidney disease (reduced renal function) and for her hypertensive cardiovascular disease; that the Labor Code section 3212.2 presumption should apply to sleep disorder, diabetes, and kidney disease;[1] and that the reports and deposition testimony of internal medicine qualified medical examiner (QME) Lawrence R. Miller, M.D., rebut the strict application of the Combined Values Chart as to disability caused by sleep disorder, diabetes, and kidney disease, so the factors of disability should be added not combined.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

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

We have considered the allegations in the Petition and the Answer and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to defer the issues of permanent disability (Finding of Fact 3), and attorney fees (Finding of Fact 7). The Award will be amended based thereon, and the matter will be returned to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her ears/hearing, neck, upper back, hands, heart/hypertension, kidneys/chronic kidney disease, lower back, hips, knees, feet, and in the form of GERD, asthma, diabetes, and sleep disorder, while employed by defendant as a correctional officer during the period from January 1, 1990, through November 1, 2017.

On July 27, 2018, applicant was evaluated by QME Dr. Miller. (App. Exh. 6, Dr. Miller, July 27, 2018.) Dr. Miller examined applicant, took a history, and reviewed the medical record. The diagnoses were:

> Occupational asthma.
> Hypertensive cardiovascular disease with end-organ damage.
> Gastroesophageal reflux disease. [GERD]
> Moderate-to-severe obstructive sleep apnea.
> Adult-onset diabetes mellitus well controlled.
> Chronic renal insufficiency, stage III A.
> (App. Exh. 6, p. 28)

Regarding apportionment, Dr. Miller stated that: 100% of the asthma disability was industrial; 60% of the hypertension/cardiovascular disease disability was industrial; 30% of the sleep apnea disability was industrial; and 100% of the diabetes disability was non-industrial. (App. Exh. 6, p. 33.)

On March 4, 2019, Dr. Miller's deposition was taken. (App. Exh. 2, Dr. Miller, March 4, 2019, deposition transcript.) His testimony included:

> I wouldn't give her a 68 percent impairment based on when I saw her on 27 July 2018. … So I think if you strictly did the additive method right now on the impairment that I found, I would overestimate her present level of disability. I would choose either one of the two, because there's overlap between her -- if we just take her renal insufficiency, it's 30 percent. If we take her heart with renal insufficiency, it's 30 percent. I think the fairest estimate is the 30 percent impairment for her heart and renal insufficiency, plus 8 for the diabetes. And go

> ahead and add that 30 plus 8 is 38 percent. ¶ I wouldn't go to 60. You double dip when you do the renal insufficiency for 30, and the hypertension with the renal insufficiency for 30. … ¶ …I would not add those. I choose one or the other. I wouldn't -- I wouldn't use both as I said in my deposition and I said it again in the supplemental report. And I'm saying it today. (App. Exh. 2, pp. 25 – 27.)
> My problem is double dipping for the hypertension cardiovascular disease with azotemia [kidney condition] and then adding azotemia. They're both the same. (App. Exh. 2, p. 33.)

In his June 6, 2019 supplemental report Dr. Miller stated:

> I felt that her hypertensive disease and chronic renal insufficiency should be rated alone on her renal insufficiency with development of hypertensive nephrosclerosis with a class II impairment from upper urinary tract disease based on her reduced glomerular filtration rate [kidney test] and creatinine clearance [blood/urine test].
> (App. Exh.1, Dr. Miller, June 6, 2019, p. 2.)

The parties proceeded to trial on January 22, 2020. The issues submitted for decision included parts of body injured, permanent disability/apportionment, whether the section 3212.2 presumption applied to sleep disorder, diabetes, hypertension, and chronic kidney disease, correct impairment for chronic kidney disease, and whether the disability for the injured body parts should be added or combined. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 22, 2020, pp. 2 – 3.)

DISCUSSION

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19). In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (In re: COVID-19 State of Emergency En Banc (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020. Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020, and the Petition was timely filed. Therefore, the petition for reconsideration is deemed filed on April 13, 2020, and the opinion granting the petition for reconsideration was issued within the 60 day period.

Pursuant to section 3212.2:

> In the case of officers and employees in the Department of Corrections having custodial duties, each officer and employee in the Department of Youth Authority having group supervisory duties, and each security officer employed at the Atascadero State Hospital, the term "injury" includes heart trouble which develops or manifests itself during a period while such officer or employee is in the service of such department or hospital. ¶ … Such heart trouble so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment. …
> (Lab. Code, § 3212.2)

Applicant argues that the presumption applies to her sleep disorder, diabetes, and kidney disease. The Second District Court of Appeal determined that for the purpose of applying the section 3212.2 presumption, "heart trouble" includes hypertension. (*Muznik v. Workers' Comp. Appeals Bd.* (1975) 51 Cal. App. 3d 622, [40 Cal.Comp.Cases 578].) However, applicant cites no authority that states the heart trouble presumption applies to diabetes, a sleep disorder, or kidney disease. Applicant's arguments are inconsistent with the cases cited in the Petition and we agree with the WCJ that the case law does not expand heart trouble to include non-cardiovascular systems such as a sleep, diabetes, and kidney disease. (Report, p. 6.)

Regarding the issue of adding or combining factors of disability:

> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (e.g. blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate.
> (American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), p. 10.)

The disability values of multiple impairments may be added instead of combined using the Combined Values Chart if adding the impairments provides an accurate rating of the injured worker's disability, particularly when there is no overlap, and when the synergistic or additive effect of the multiple disabilities support that method of combination. (*Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595]; *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ den.); *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ den.).)

It appears applicant's arguments that there should be separate impairment ratings for her kidney disease and her hypertensive cardiovascular disease, and that Dr. Miller rebutted the application of the Combined Values Chart as to applicant's sleep disorder, diabetes, and kidney disease, are premised on the underlying argument that the factors of disability should be added, not combined.[2] However, review of Dr. Miller's reports and deposition testimony are clear that he was not giving an opinion as to whether applicant's disability factors should be combined using the Combined Values Chart or added per the *Kite* decision. (*Athens Administrators v. Workers' Comp. Appeals Bd. (Kite), supra.*) The doctor repeatedly expressed his opinion that the impairment caused by applicant's hypertension cardiovascular disease (30%) and the kidney disease (30%) were, in effect the same disability and should result in one 30% factor, not two 30% factors. (See App. Exh. 2, pp. 25 – 26 and p. 33; App. Exh.1, p. 2.) Dr. Miller specifically said it was his opinion that the disability from the renal insufficiency and the disability from the hypertension with the renal insufficiency are the same thing. (App. Exh. 2, p. 33.)

Although the issue of whether applicant's disability factors should be combined using the Combined Values Chart or added per the *Kite* decision was raised during Dr. Miller's depositions and in the correspondence he received from counsel, he did not actually address that issue in his testimony or his reports, nor did he explain the rational or reasoning for his opinion that there should only be one rating for applicant's kidney disease and her hypertension/heart trouble. Thus, his testimony and reports are not substantial evidence to rebut the application of the Combined Values Chart, and as discussed above, they are not evidence as to whether there should be separate impairment ratings for applicant's kidney disease and her hypertensive cardiovascular disease. However, as noted in the MOH/SOE, those issues were included in the issues submitted for decision. Our review of the trial record indicates that the record contains no evidence addressing those issues. Absent evidence addressing those issues there is no evidence upon which an accurate finding as to the permanent disability caused by applicant's injury can be made.

An award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317

[2] It must be noted that Dr. Miller stated 100% of applicant's diabetes was caused by non-industrial factors and based thereon the WCJ found that "applicant did not sustain diabetes arising out of and in the course of employment." (See App. Exh. 6, p. 33; F&A, p. 1.) That Finding will not be disturbed and issues pertaining to disability caused by diabetes are moot.

[35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Again, having reviewed the testimony and reports from Dr. Miller, it appears that either he does not understand the issue of adding disability factors as opposed to combing those factors, or he simply refuses to address that issue. A medical opinion is not substantial evidence if it is based on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Therefore, it is very unlikely that additional reports or testimony from Dr. Miller will constitute substantial evidence. Under these circumstances, upon return of this matter, it is appropriate that the parties have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we affirm the F&A except that we amend the F&A to defer the issues of permanent disability (Finding of Fact 3), and attorney fees (Finding of Fact 7). The Award is amended based thereon, and the matter is returned to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on March 17, 2020, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The issue of permanent disability caused by the cumulative injury herein, is deferred with jurisdiction reserved.

* * *

7. The issue of attorney fees is deferred.

AWARD

* * *

a. The award of permanent disability indemnity and attorney fees based thereon, is deferred pending further development of the record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 14, 2021

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

STELLA ALDAMA
WHITING COTTER & HURLIMANN
STATE COMPENSATION INSURANCE FUND
OFFICE OF THE DIRECTOR-LEGAL UNIT

TLH/*pc*

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