WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CAROL BERNHARD, *Applicant*

vs.

CORE MARK INTERNATIONAL and LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ2537816 (LBO 0392489)
Long Beach District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on November 18, 2021, wherein the WCJ found in pertinent part that on February 21, 2007, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her lumbar spine, psyche, and internal system, and that the injury caused 61% permanent disability.

Applicant contends that the report from Vocational Rehabilitation Expert Laura M. Wilson is substantial evidence that applicant is permanently totally (100%) disabled, and that the opinions of psychiatric agreed medical examiner (AME) David M. Davis, M.D., and orthopedic qualified medical examiner (QME) Norman N. Nakata, M.D., are not substantial evidence on the issue of apportionment.

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

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 grant reconsideration, and we will affirm the F&A except that we will amend the F&A to find that there is no substantial evidence as to apportionment to non-industrial factors (Finding of Fact 5); that applicant's injury caused 63% permanent disability (Finding of Fact 6); and the reasonable value

of the services of applicant's attorney is $14,843.69 (Finding of Fact 8); the Award will be amended based thereon.

BACKGROUND

Applicant claimed injury to her lumbar spine, psyche, and internal system while employed by defendant as program manager on February 21, 2007.

QME Dr. Nakata evaluated applicant on November 19, 2007. Dr. Nakata examined applicant, took a history, and reviewed the medical record. He determined that applicant had not reached maximum medical improvement (MMI). (Joint Exh. 101, Dr. Nakata, November 27, 2007, p. 9.) On March 30, 2009, applicant was re-evaluated by Dr. Nakata. After re-examining applicant and reviewing the interim medical record Dr. Nakata recommended that applicant undergo a lumbar MRI and lower extremity EMG/Nerve Conduction Studies. (Joint Exh. 103, Dr. Nakata, March 31, 2009, p. 7.) On March 27, 2012, Dr. Nakata re-evaluated applicant. He reviewed the medical record, re-examined applicant, and concluded that her condition had reached MMI status.[1] The diagnoses were lumbar sprain and degenerative disc disease at the L5-S1 level. (Joint Exh. 109, Dr. Nakata, March 27, 2012, p. 10.) On the issue of apportionment, Dr. Nakata stated:

> It is my medical opinion that 20% of her lumbar impairment is due to pre-existing factors and 20% is non-industrial, due to natural progression of the underlying degenerative disc disease absent her motor vehicle accident at work when I last evaluated her. This will total to 40% for non-industrial causes of the lower back. The balance of 60% is considered work related.
> (Joint Exh. 109, p. 12.)

On May 7, 2013, applicant was evaluated by AME Dr. Davis. (Joint Exh. 112, Dr. Davis, June 5, 2013.) Dr. Davis took a history, reviewed the medical record and conducted various psychological tests. The diagnoses included Adjustment Disorder and Major Depressive Disorder with a Global Assessment of Function (GAF) score of 56 which converts to whole person impairment (WPI) of 21%. (Joint Exh. 112, pp. 92 – 93 and p. 103.) Dr. Davis concluded that 85% of applicant's psychiatric disability was caused by the February 21, 2007 injury and 15% was due to applicant's pre-existing psychiatric condition. (Joint Exh. 112, p. 108.) After reviewing

[1] Dr. Nakata stated that applicant's "condition would have reached maximal medical improvement nine months following the motor vehicle accident at work." (Joint Exh. 109, p. 11.)

additional records Dr. Davis found that applicant had a GAF score of 59 which reduced the WPI to 17%. (Joint Exh. 114, Dr. Davis, October 22, 2014, p. 13.)

On February 9, 2016, Dr. Davis re-evaluated applicant. (Joint Exh. 117, Dr. Davis, February 24, 2016.) The doctor took an interim history, reviewed additional medical records, and performed psychological tests. He diagnosed Adjustment Disorder with Mixed Anxiety and Depressed Mood, and Major Depressive Disorder. (Joint Exh. 117, pp. 31 – 32.) Dr. Davis again concluded that applicant's GAF score was 59, with 17% WPI. (Joint Exh. 117, p. 37.) Regarding apportionment, Dr. Davis stated:

> It still remains my opinion that it is within reasonable medical probability that 85% of the examinee's permanent psychiatric disability was caused by the February 21, 2007 industrial injury and all the stress directly attributable to it. (Included in this 85% is the 25% due to the employee's decision not to allow the examinee to work modified work and the negative performance evaluation of October 5, 2007). It still remains my opinion that it is within reasonable medical probability that 15% of the examinee's permanent psychiatric disability was caused by the examinee's preexisting psychiatric disability related to unresolved negative feelings towards her biological father (Cliff), as well as less but significant negative feeling towards her mother related to her mother's passivity during her adolescence, and the examinee's preexisting tendency to somatize.
> (Joint Exh. 117, p. 41.)

On February 3, 2020 applicant was interviewed by vocational expert Laura M. Wilson. (App. Exh. 1, Laura M. Wilson, April 14, 2020, p. 26.) Ms. Wilson's discussion of the meeting she had with applicant included the following:

> During my meeting with Ms. Bernhard, she mentioned that since her industrial injury she has encountered difficulties in conducting Activities of Daily Living such as shopping, cooking, using the telephone, laundry, housework, and driving. Ms. Bernhard noted that she can stand for 10 minutes and has to lean on walls or her electric chair for stability. … Mr. Bernhard stated that any event that requires long durations of walking and or standing such as family outings or visitation, requires that she use her electric chair instead of the cane. …
> (App. Exh. 1, p. 26.)

Applicant was interviewed by Vocational Rehabilitation Expert Keith S. Wilkinson on June 5, 2021. (Def. Exh. A, Keith S. Wilkinson, June 5, 2021.) Under "Assistive Devices" Mr. Wilkinson noted, "Ms. Bernhard reported using the following assistive devices: a one-prong cane; a three-pronged cane; a motorized wheelchair." (Def. Exh. A, p. 25.)

The parties proceeded to trial on October 6, 2021. The parties' stipulations included that the medical reports and the deposition transcripts from Norman Nakata, M.D. David Davis, M.D. and Paul Grodan, M.D., rate at 61% permanent disability after apportionment, and that they rate at 63% without apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 6, 2021, p. 2.) The issues submitted for decision included permanent disability/ apportionment, and whether applicant was 100% permanently disabled. (MOH/SOE, p. 3.)

DISCUSSION

It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].) In his Opinion on Decision, the WCJ explained:

> During the trial, the applicant testified that she had issues with certain aspects of Keith Wilkinson's Vocational Report in that she was unsure where he was obtained some information. One instance that stood out to the undersigned was the applicant adamantly testified that [she] does not and had not used a wheelchair as Mr. Wilkinson reported (exhibit A, page 25 and page 6, line 18 of the Minutes of Hearing). However, this contradicts what the applicant told Ms. Wilson as a review of her report shows that the applicant used an "electric chair for stability" as well as "any event that requires long durations of walking and or standing such as a family outing or visitation, requires that she use her electric chair instead of a cane." (Exhibit 1, page 26). As the undersigned does not find the applicant to be a credible witness and the report of Ms. Wilson is found to be non-substantial in conjunction with the doctor's finding the applicant can work with restrictions, it is found that the applicant is not 100% permanently disabled.
> (Opinion on Decision, p. 2.)

Our review of the trial record, including the medical reports, the vocational expert reports, and applicant's testimony, indicates the WCJ is correct in concluding that the record does not contain substantial evidence that applicant is 100% permanently disabled.

As noted above, at the trial the parties stipulated that the medical reports and the deposition transcripts from Dr. Nakata, Dr. Davis, and internal medicine AME Paul Grodan, M.D., are rated at 61% permanent disability after apportionment, and that they are rated at 63% without apportionment. (MOH/SOE p. 2.)

In order to constitute substantial evidence on the issue of apportionment, the reporting physician must delineate 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 and the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*).)

As noted above, in his March 27, 2012 report QME Dr. Nakata, explained his opinion on apportionment. Dr. Nakata stated:

> It is my medical opinion that 20% of her lumbar impairment is due to pre-existing factors and 20% is non-industrial, due to natural progression of the underlying degenerative disc disease absent her motor vehicle accident at work when I last evaluated her. This will total to 40% for non-industrial causes of the lower back.
> (Joint Exh. 109, p. 12.)

Also, as noted above, after re-examining applicant on February 9, 2016, AME Dr. Davis addressed the issue of apportionment as follows:

> It still remains my opinion that it is within reasonable medical probability that 15% of the examinee's permanent psychiatric disability was caused by the examinee's preexisting psychiatric disability related to unresolved negative feelings towards her biological father (Cliff), as well as less but significant negative feeling towards her mother related to her mother's passivity during her adolescence, and the examinee's preexisting tendency to somatize.
> (Joint Exh. 117, p. 41.)

Although both doctors explained that applicant had pre-existing conditions, neither doctor explained how and why those conditions were causing permanent disability at the time of their evaluations, nor did they explain how and why those conditions were responsible for the percentage of disability that they assigned. Thus, they did not comply with the requirements stated in *Escobedo v. Marshalls, supra*, and in turn, their reports do not constitute substantial evidence regarding apportionment. For these reasons, defendant did not meet its burden of proof on the issue of apportionment. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1107, 1114-1115 [71 Cal.Comp.Cases 1229].)

Any 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. supra*; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. ((Lab. Code, § 5702; Cal. Code Regs., tit. 8, § 10835; *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) Here, the stipulation that applicant's disability is 63% if rated without apportionment has not been disputed, and it is an appropriate basis for awarding permanent disability.

Accordingly, we grant reconsideration, and we affirm the F&A except that we amend the F&A to find that there is no substantial evidence as to apportionment to non-industrial factors (Finding of Fact 5); that applicant's injury caused 63% permanent disability (Finding of Fact 6); and the reasonable value of the services of applicant's attorney is $14,843.69 (Finding of Fact 8); the Award is amended based thereon.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Award issued by the WCJ on November 18, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 18, 2021 Findings of Fact and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. There is no substantial evidence as to apportionment to non-industrial factors.

6. Applicant's injury caused permanent disability of 63%, entitling applicant to 375.25 weeks of disability indemnity payable at the rate of $230.00 per week for the first 60 days and $264.50 thereafter based on the Labor Code 4658(d) increase, in the total sum of $94,725.91 less applicant attorney fee of $14,843.69, and less a stipulated third party credit in the amount of $3,279.22.

* * *

8. The reasonable value of the services and disbursements of applicant's attorney is $14,843.69.

AWARD

*** * ***

a. Permanent disability of 63%, entitling applicant to 375.25 weeks of disability indemnity at the rate of $230.00 for the first sixty days and $264.50 thereafter based on the Labor Code 4658(d) increase, in the total sum of $94,725.91, less credit to defendant for all sums previously paid on account thereof, less $14,208.89 payable to Ozurovich and Schwartz as attorney fees to be commuted from the far end of the award, and less a stipulated third party credit in the amount of $3,279.22, to be commuted from the far end of the award.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 13, 2022

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

CAROL BERNHARD
OZUROVICH & SCHWARTZ
TESTAN LAW

TLH/*pc*

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