WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAULETTE WOODS, *Applicant*

vs.

LIV HOME, INC.;UNITED STATES FIRE INSURANCE COMPANY administered by CRUM & FORSTER, *Defendants*

Adjudication Numbers: ADJ10790108, ADJ11826873
San Luis Obispo District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's and defendant's Petitions for Reconsideration to further study the factual and legal issues in this case.[1] This is our Opinion and Decision After Reconsideration.

Applicant and Defendant seek reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 3, 2020, wherein the WCJ found in pertinent part that regarding case number ADJ10790108, applicant sustained injury arising out of and in the course of her employment (AOE/COE) to her cervical spine, shoulders, left hand, lumbar spine, and left knee, and that the injury caused 50% permanent partial disability; and in case number ADJ11826873 the WCJ found that applicant sustained injury AOE/COE to her left hand/thumb, that she did not sustain injury to her cervical spine, shoulders, lumbar spine, and left knee, and that the injury caused 6% permanent partial disability.

Applicant contends that her injuries caused 97% permanent disability based on the opinion of vocational expert Steve Ramirez or in the alternative, 95% permanent disability based on the opinion of vocational expert Everett O'Keefe.

[1] We granted the Petitions to allow further study of the factual and legal issues; Commissioner Lowe was a member of the panel. Commissioner Lowe no longer serves on the Appeals Board and another panel member has been assigned in her place.

Defendant contends that applicant's injury in case number ADJ10790108 caused 33% permanent disability and that her injury in case number ADJ11826873 caused 15% permanent disability.

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

We have considered the allegations in the Petitions and applicant's Answer, and the contents of the Reports. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her neck, shoulders, back, left knee, and left hand, while employed by defendant as a personal care provider on October 1, 2014 (ADJ10790108). Defendant accepted the injury claim. Applicant also claimed injury to her neck, shoulders, back, left knee, and left hand/thumb while employed by defendant as a personal care assistant during the period from July 1, 2000, through October 1, 2014 (ADJ11826873). The injury claim as to applicant's left hand/thumb was accepted and the other claimed body parts were denied.

Applicant was evaluated by orthopedic qualified medical examiner (QME) Scott A. Graham, M.D., on February 23, 2017, regarding her October 1, 2014, injury claim (ADJ10790108). (App. Exh. 2, Dr. Graham, February 23, 2017.) Dr. Graham examined applicant, took a history, and reviewed the medical record. The diagnoses were lumbar spondylosis, lumbago (low back pain), post right and left shoulder surgeries, left thumb CMC joint osteoarthritis, and left wrist De Quervain's tenosynovitis. (App. Exh. 2, p. 15.) Regarding the cause of applicant's symptoms, Dr. Graham stated:

> It is within a reasonable degree of medical probability that the specific incident at work of 10/01/14 caused the claimant's right and left shoulder condition, caused the lumbago and precipitating symptoms underlying lumbar spondylosis, and precipitated symptoms of the left thumb CMC [carpometacarpal joint i.e., bottom of the thumb] joint osteoarthritis and caused the left wrist de Quervain's tenosynovitis. ¶ There is no industrial injury to the knees.
> (App. Exh. 2, p. 15.)

The doctor later noted that applicant had reached maximum medical improvement (MMI) status as of February 23, 2017. (App. Exh. 2, p. 16.) Regarding apportionment he stated that 100% of applicant's lumbar spine, right and left shoulder, and left thumb disability was caused by the October 1, 2014, specific injury. (App. Exh. 2, p. 17.)

On August 8, 2018, Dr. Graham re-evaluated applicant. (App. Exh. 3, Dr. Graham, August 8, 2018.) He re-examined applicant, took an interim history, and reviewed additional medical records. Dr. Graham stated that based on the medical treatment applicant received after the February 23, 2017, evaluation, applicant's right shoulder and left thumb reached MMI on August 8, 2018, and the remaining injured body parts were at MMI as of February 23, 2017. (App. Exh. 3, p. 16.) He also noted that applicant had, "… no symptomatology in any of these areas antedating the specific injury of 10/01/14. There is no evidence of cumulative trauma." (App. Exh. 3, p. 16.) On the issue of apportionment, Dr. Graham concluded as to applicant's left thumb disability, "… 60% is apportionable to the industrial injury of 10/01/14, 40% to CT while working for the company." (App. Exh. 3, p. 18.)

On April 3, 2019, Dr. Graham again re-evaluated applicant; the re-evaluation was limited to applicant's left thumb. (App. Exh. 5, Dr. Graham, April 3, 2019.) The diagnosis was, "Status post left thumb CMC fascia arthroplasty trapeziectomy [removal of the trapezium/wrist bone] for end-stage CMC osteoarthritis." (App. Exh. 5, p. 12.) On the issues of causation and apportionment, Dr. Graham stated:

> As noted in prior reporting, this claimant worked for the same company for 14 years. The osteoarthritis in that joint is a wear and tear phenomenon from CT. Again, but for the industrial injury of 10/01/14, it is more likely than not that she would still be asymptomatic at this point in time. Therefore, 60% is apportioned to this industrial injury of 10/01/14, 40% to the CT injury.
> (App. Exh. 5, p. 13.)

Dr. Graham's deposition was taken on July 10, 2019. (App. Exh. 1, Dr. Graham, July 10, 2019, deposition transcript.) The testimony relevant to the issues to be addressed herein include the following:

> A. Okay as well as taking account effect on ADLs, yes, this is a synergistic effect. There is overlap because … if you have a right ankle and a left shoulder, you know, two separate different sides of the body, that would be one thing, probably combined. And I think the Kite decision needs more refinement. But be that as it may, she's got her back, her left leg, both shoulders. She had redo

surgery on her right shoulder. She got this left hand, basically her thumb and her wrist, to me that should be all additive.
Q. Because of the overlap?
A. Yes, because of the overlap. Because so many body parts to the point where there is overlap, yes. And as you probably know, she underwent a fascia! arthroplasty to that left thumb CMC joint subsequently, which shows that that was a problem.
(App. Exh. 1, pp. 11 – 12.)

A. If you have pain in one area of your body, you can ordinarily deal with it. A couple places in your body, a little bit harder to deal with. When you have pain in six different areas of your body, in my experience of 40 years of taking care of people, this potentiates the entire pain syndrome. It is not 1ess than six areas. To these individuals, it feels like more than six areas that are hurting. There is a potentiation of their symptomatology. And I think that combining, rather than adding the impairments, diminishes the accuracy of the true impairment of these individuals. If you have one or two areas that are certainly separate geographically on the body, if we have to combine those per the guides, I'm all for it. But if you have an individual who has multiple painful areas, one plus one plus one, plus one, -- did I get seven yet ? -- whatever, or six, it doesn't equal six for these people. It's more than six for these people.
(App. Exh. 1, pp. 13 – 14.)

A. I understand what you're saying. … But when you have so many body areas that are painful, it's like having a little horn on your kid's bike versus a foghorn blaring in your ear. Again, we aren't talking about one or two injury areas. So I will fall back again that with the number of injured areas affecting this individual, as reflected in the ADLs, in my opinion, this claimant clearly is experiencing a potentiation of her overall pain condition of so many body parts being involved; and therefore, combining rather than adding gives a more accurate assessment of the ultimate impairment, the total impairment for this individua1.
(App. Exh. 1, p. 14.)

Q. … So, there is bursitis and arthritis in that MRI. My question, then, is in regards to apportionment, why haven't we apportioned anything to those two things?
A. Okay. Because the bursitis was caused by the injury. The arthritis is ordinarily asymptomatic. She worked for the company 14 years; … I believe she worked for the company for 14 years. I believe that is -- and the amount of work that she was doing with caregiving, that would have been sufficient to.

Q. Okay. So in regards to that, then, this is a specific injury. We're not talking about a cumulative trauma.
A. Correct.

Q. It sounds like what you are referring to is a cumulative trauma in regards to the shoulders -- or this is the left shoulder. So with regards to the shoulder, do you believe that there is a cumulative trauma claim in addition to this specific date of injury? I mean, her 14 years of work.
A. No. Well, 14 years of work would contribute to the AC arthritis, yes. Yes, so the AC condition would be -- 50 percent would be the CT and 50 percent would be to the specific for the Mumford procedure, which: believe is providing you 10 percent upper extremity impairment, 6 percent whole person impairment.

Q. Okay. So just to that 10 percent of the upper extremities?
A. Yes, just for the Mumford procedure, correct.

Q. And then in regards to that CT, you believe it's to the date of injury?
A. Yes. Resulting from the date of injury, yes. …

Q. In regards to the bursitis, explain to me how that was a result of the specific date of injury.
A. She had no problems with her shoulder at all beforehand. I don't have any documentation she had problems with her shoulder. The bursitis is just a radiographic description. … She had a post-traumatic impingement syndrome is what she had.

Q. My understanding of bursitis, and again, I'm not the expert here, is that that's from repetitive use.
A. No. It can be, but not necessarily. And if you have bursitis from repetitive use, you are going to have symptoms. She had no symptoms until she got hurt, until this individual she tried to catch. The bursitis is a radiographic term. The diagnosis was shoulder impingement.

Q. Okay. So then you wouldn't apportion any of the bursitis aspect to the cumulative trauma claim that you have created?
A. No, no.
(App. Exh. 1, pp. 15 – 17.)

A. To be consistent, she had similar issues with her right shoulder, right AC arthritis. She undergoes the Mumford procedure. So therefore, same apportionment for the Mumford portion of the right shoulder.
(App. Exh. 1, p. 18.)

A. Of the right and left shoulder, just that 10 percent is 50-50 CT specific.
Q. Okay. All right.
A. Because you are right, she had osteoarthritis of that right AC joint. I didn't see the X-ray. I don't know how bad, but she had a Mumford procedure. Clearly, if had arthrosis, it wasn't caused but it was precipitated as a result of the specific.
(App. Exh. 1, p. 19.)

The parties proceeded to trial on November 5, 2019. The issues submitted for decision included permanent disability and apportionment in regard to both injury claims. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 5, 2019, pp. 2 – 3.)

DISCUSSION

It has long been the law that in order for a physician's opinion to constitute substantial evidence the reporting physician must explain the reasoning behind his or her opinion, and a medical opinion is not substantial evidence if it is based on an incorrect legal theory. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v.Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v.Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, the rating of applicant's permanent disability caused by her injuries, including the issues of apportionment and whether the factors of disability should be combined or added, is based on the opinions of QME Dr. Graham as stated in his reports and deposition testimony. However, as noted above, Dr. Graham's conclusions as to apportionment are quite inconsistent. For example, he initially stated that 100% of applicant's lumbar spine, right and left shoulder, and left thumb disability was caused by the October 1, 2014, specific injury. (App. Exh. 2, p. 17.) He later stated that 60% of applicant's left thumb disability was caused by the October 1, 2014, injury, and 40% was caused by the cumulative injury. (App. Exh. 5, p. 13.) Subsequently, at his deposition, Dr. Graham testified that the Mumford procedure's applicant had caused 10% disability in each shoulder and the 10% disability would be apportioned "50-50 CT specific." (App. Exh. 1, p. 19.) As to the issue of whether applicant's factors of disability should be added or combined, Dr. Graham's testimony included his opinion that:

> Okay as well as taking account effect on ADLs, yes, this is a synergistic effect. There is overlap … She had redo surgery on her right shoulder. She got this left hand, basically her thumb and her wrist, to me that should be all additive. Q. Because of the overlap? A. Yes, because of the overlap. … as reflected in the ADLs, in my opinion, this claimant clearly is experiencing a potentiation of her overall pain condition of so many body parts being involved; and therefore, combining rather than adding gives a more accurate assessment of the ultimate impairment, the total impairment for this individua1.
> (App. Exh. 1, pp. , pp. 11 – 12, and p. 14.)

We have previously explained that the disability values of multiple impairments may be added instead of combined using the combined values chart (CVC) 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. (*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.); see also *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595].)

Clearly, Dr. Graham's opinions regarding apportionment, and the adding or combining of applicant's disability, are inconsistent and they appear to be based on a misunderstanding of the applicable law. Thus, his opinions do not constitute substantial evidence and in turn, cannot be the basis for a decision of the Appeals Board. (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 [35 Cal.Comp.Cases 500].) The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *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).) However, under the circumstances of this matter, upon return to the trial level, 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.)

Finally, in regard to the reports from the vocational experts, a determination that an employee "cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete" in the open labor market and "should be considered in any determination of a permanent disability rating." (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587].) Also, the permanent disability rating schedule (PDRS) can be rebutted by demonstrating that due to the industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. (*Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal.App.4th 1262, 1277 [76 Cal.Comp.Cases 624].) However, in the Opinion on Decision, the WCJ explained that:

> First, it is clear that applicant continues to work in a position that requires utilization of her upper extremities and her injured body parts. In her testimony, she has stated that she continues to work, despite the fact that she does get tired on occasion. It is further noted that not only is applicant amenable to vocational rehabilitation, she is actually in a program at this time and will soon be seeking employment in the accounting field.
> (F&A p. 4, Opinion on Decision.)

In his Report, the WCJ further explained:

> Applicant, however, testified at the time of trial, that she was not only amenable to vocational rehabilitation, but that she was in the process of vocational rehabilitation and was working at a job requiring repetitive upper extremity usage. She was working for the Salvation Army, exceeding the work restrictions placed upon her and utilized by both Mr. O'Keefe and Mr. Ramirez in their analysis. Further, she had proven herself capable of rehabilitation, as she was in training to attain accounting skills and was actually performing such duties at the time of trial.
> (Report, p. 2.)

Having reviewed the trial record, we agree with the WCJ's conclusion that the reports from the vocational experts, Steve Ramirez and Everett O'Keefe, do not rebut the provisions of the 2005 PDRS. (See *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119]; *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624].) Therefore, they are not substantial evidence upon which a finding as to applicant's permanent disability can be based.

Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

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 February 3, 2020, is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 8, 2022

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

PAULETTE WOODS
WILLIAM HERRERAS
COLEMAN, CHAVEZ & ASSOCIATES

TLH/mc

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