WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RIGOBERTO GONZALEZ, *Applicant*

vs.

TEAM INFINITY and PUBLIC SERVICE MUTUAL INSURANCE COMPANY, administered by OCCUSURE CLAIMS SERVICES, *Defendants*

Adjudication Number: ADJ7263865

Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Defendant seeks reconsideration of the Findings, Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on January 18, 2022, wherein the WCJ found in pertinent part that while employed by defendant during the period from August 28, 2001, through March 25, 2010, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his heart, upper extremities, spine, and lower extremities; and that the injury caused 100% permanent disability.

Defendant contends that the reports from applicant's vocational expert Paul Broadus are not substantial evidence; that report from defendant's vocational expert Aida Worthington is substantial evidence; that the reports from orthopedic agreed medical examiner (AME) Steven Nagelberg, M.D., and internal medicine AME Edward J. O'Neill, M.D., are substantial evidence and based thereon applicant's injury caused 86% permanent disability.

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

---

[1] As noted, we previously granted the Petition to allow further study of the factual and legal issues; Commissioner Lowe who was previously a panelist in this matter no longer serves on the Appeals Board. Another panel member has been assigned in her place.

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 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 his heart, upper extremities, spine, and lower extremities while employed by defendant as a service technician/mechanic during the period from August 28, 2001, through March 25, 2010.

On February 16, 2011, orthopedic AME Dr. Nagelberg evaluated applicant. Dr. Nagelberg examined applicant, took a history, and reviewed the medical record. He diagnosed applicant as having:

> 1. Psoriatic arthritis. 2. Rheumatoid arthritis. 3. Swan neck deformity, right middle finger. 4. Probable bilateral carpal tunnel syndrome. 5. Internal derangement, left and right knees. 6. Possible bilateral plantar fasciitis. 7. Possible lumbar radiculopathy. 8. Bilateral rotator cuff tendinitis. 9. Possible cervical radiculopathy. 10. Bilateral wrist arthritis.
> (Court Exh. II, Steven Nagelberg, M.D., February 17, 2011, p. 21.)

Dr. Nagelberg then stated:

> At this point, the patient is in need of additional evaluation. I will refer him for electrodiagnostic tests of the upper and lower extremities. MR studies of the cervical spine, lumbar spine, left and right shoulders, left knee, right hip, and left and right wrists will also be obtained. ¶ It is essential that we have the assistance of a rheumatologist to help in sorting out to what the degree the diagnosis of psoriatic arthritis and rheumatoid arthritis have impacted the patient's overall level of impairment independent of his industrial injury. I am certain that there will be definite apportionment concerning these nonindustrial conditions. ¶ I will comment further after the additional diagnostic studies have been completed and received for my review.
> (Court Exh. II, p. 22.)

Regarding the issue of apportionment, Dr. Nagelberg explained:

> I am going to defer any medical opinion concerning apportionment until I have had the opportunity to review not only the diagnostic studies that I have ordered, but also a report [sic] from an Agreed Medical Examiner in the field of rheumatology, as there may be a substantial issue of apportionment with respect

> to any residual impairment that Mr. Gonzalez has as a result of his underlying arthritic condition.
> (Court Exh. II, p. 23.)

Applicant was evaluated by rheumatology qualified medical examiner (QME) Seymour Levine, M.D. Having reviewed the report from Dr. Levine, Dr. Nagelberg stated:

> I have now been provided with the report of Dr. Levine of 3/30/12. I note he indicates the psoriatic arthritis is a non-industrial issue. ¶ The patient noted complaints involving the peripheral joints of the axial skeleton as well as features of rheumatoid arthritis and spondyloarthropathy. Dr. Levine reiterated that trauma does not cause autoimmune disease like psoriatic arthritis or rheumatoid arthritis. However, repetitive use of inflamed joints may cause resultant exacerbation and aggravation of the arthritis. ¶ Dr. Levine suggests the patient has sustained a CT injury. He indicates 50% of the patient's disability is due to non-industrial causation, and 50% would be an exacerbation and aggravation due to a continuing trauma injury. This is a well thought out opinion.
> (Court Exh. EE, Steven Nagelberg, M.D., July 13, 2012, p. 5.)

Dr. Nagelberg re-evaluated applicant on November 7, 2012. Dr. Nagelberg re-examined applicant, took an interim history, and reviewed additional medical records. He noted that:

> At this point, I will obtain MR studies of the cervical spine, lumbar spine, right wrist, and left and right knees. EMG/NCS of the upper and lower extremities will also be obtained. ¶ After these studies are completed and received for my review, I will issue my final opinions on causation and impairment.
> (Court Exh. DD, Steven Nagelberg, M.D., November 8, 2012, p. 11.)

After reviewing the diagnostics he had requested, on November 29, 2012, Dr. Nagelberg issued his permanent and stationary report. He concluded that applicant had 8% cervical spine whole person impairment (WPI), 8% lumbar spine WPI, 6% WPI for his right wrist, and 4% WPI as a result of his bi-lateral knee conditions. (Court Exh. CC, Steven Nagelberg, M.D., November 29, 2012, pp. 4 - 5.) As to the issue of apportionment, Dr. Nagelberg stated that 100% of the cervical and lumbar spine impairment was caused by the cumulative work injury, that 50% of the right wrist and bi-lateral knee impairment was due to the cumulative work injury, and 50% of the right wrist and bi-lateral knee impairment was due to a pre-existing non-industrial arthritic condition. (Court Exh. CC, p. 5.)

On July 8, 2013, internal medicine AME Dr. O'Neill evaluated applicant. After examining applicant, taking a history, and reviewing the medical record, Dr. Neill stated:

> Diagnostically from an internal standpoint, Mr. Gonzalez has: 1) Malignant hypertension. 2) Probable arteriosclerotic coronary artery disease with prior myocardial infarction and ischemic cardiomyopathy and markedly reduced ventricular ejection fraction of 30%. 3) Psoriatic arthritis with possible rheumatoid arthritis as well. 4) GERD. 5) Obstructive sleep apnea.
> (Court Exh. PP, Edward J. O'Neill, M.D., September 11, 2013, p. 8.)

Regarding applicant's disability, Dr. Neill stated that the hypertension caused 49% WPI, the coronary artery disease caused 20% WPI, the upper GI/GERD caused 7% WPI, and that applicant had 7% WPI as a result of his obstructive sleep apnea. (Court Exh. PP, pp. 8 – 9.) He later stated:

> The unusually malignant degree of his hypertension makes the source of that condition likely to be occupationally related as well. I would apportion the hypertension in the same fashion as the arthritic condition; namely, 75% non-occupational and 25% occupationally related.
> (Court Exh. PP, p. 10.)

In response to correspondence from counsel, in his November 19, 2014 supplemental report, Dr. Neill explained:

> The short answer to your questions regarding the coronary artery disease and the obstructive sleep apnea is that neither of those conditions are occupationally related and any impairment or disability is non-occupationally related with no apportionment to occupational factors.
> (Court Exh. OO, Edward J. O'Neill, M.D., November 19, 2014, p. 3.)

Applicant underwent a coronary artery bypass graft surgery in June 2016, and in his subsequent report, Dr. Neill again stated that applicant's "coronary artery disease itself was a non-occupationally related condition." (Court Exh. NN, Edward J. O'Neill, M.D., October 6, 2016, p. 2.)

On February 7, 2018, orthopedic AME Dr. Nagelberg again re-evaluated applicant. After re-examining applicant and reviewing additional medical records, Dr. Nagelberg stated that applicant had 8% cervical spine WPI, 8% lumbar spine WPI, and 2% WPI for each knee. (Court Exh. BB, Steven Nagelberg, M.D., February 8, 2018, pp. 15 - 16.) Regarding apportionment, he stated that 50% of applicant's disability was caused by "his psoriatic arthritis on an industrial basis

due to his aggravation and exacerbation of his cumulative trauma work injury with the remaining 50% being attributed to non-industrial basis due to his non-industrial arthritic condition." (Court Exh. BB, p. 17.)

Dr. Nagelberg re-examined applicant, and in his September 13, 2018 report he assigned the following work restrictions: for the hips, knees, and feet preclude prolonged standing and walking, any running or jumping; for the wrists preclude repetitive gripping and grasping, lifting more than 25 pounds, and repetitive pushing and pulling activities with either upper extremity; for the shoulders preclude repetitive overhead use with the arms and repetitive pushing and pulling activities; for the cervical spine preclude repetitive movements of the head and neck; and for the lumbar spine preclude lifting more than 25 pounds and repetitive bending. (Court Exh. AA, Steven Nagelberg, M.D., September 13, 2018, p. 10.) He concluded that applicant had 8% cervical spine and 8% lumbar spine WPI; 22% left upper extremity and 23% right upper extremity WPI; and 10% left lower extremity and 10% right lower extremity WPI. (Court Exh. AA, pp. 11 – 12.) Dr. Nagelberg then said that the upper extremity disabilities should be added per the *Kite* decision[2] and that the cervical spine, lumbar spine, right lower extremity and left lower extremity disabilities should be combined. (Court Exh. AA, pp. 12 – 13.) As to the issue of apportionment, Dr. Nagelberg stated:

> [I] would apportion 50% of Mr. Gonzalez's impairment involving his shoulders, hands and wrists and fingers on an industrial basis due to his aggravation and exacerbation of his cumulative trauma work injury with the remaining 50% being attributed to non industrial causes. ¶ I find no basis here for apportionment concerning the other areas of impairment that I have addressed.
> (Court Exh. AA, p. 14.)

Internal medicine AME Dr. O'Neill re-evaluated applicant July 10, 2019. Dr. O'Neill found that applicant's cardiac condition had worsened and was "not permanent and stationary for rating purposes." (Court Exh. MM, Edward J. O'Neill, M.D., July 24, 2019, pp. 5 – 6.) The doctor was provided additional medical records to review, and in his supplemental report, he concluded:

> Clearly, he definitely has the chronic congestive heart failure at this time which is well documented, not only in my records, but also in the records of his treating physicians. This is secondary to his ischemic cardiomyopathy. ¶ According to the AMA Guides on page 47, table 3-9, his current level of impairment clearly

[2] *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ den.)

> fits into a Class III, since he does have symptoms and findings consistent with congestive heart failure. He has had the implanted ICD. He now fits into a Class IV at 60% WPI. This level of impairment includes his coronary artery disease. (Court Exh. LL, Edward J. O'Neill, M.D., September 19, 2019, p. 2.)

Applicant had a "Facetime meeting" with Vocational Rehabilitation Counselor Paul Broadus on September 8, 2020. (App. Exh. 1, Paul Broadus, October 12, 2020, p. 1.) Based on his meeting with applicant, his review of "available records," and research regarding employment options, in his LeBoeuf Analysis report Mr. Broadus concluded that applicant was "not amenable to rehabilitation, solely due to his industrial impairments" and that he no longer had "the ability to return to work in the open labor market." (App. Exh. 1, pp. 23 – 24.)

Mr. Broadus explained the basis for his conclusion as follows:

> As noted in the previous section of this report [pp. 12 – 13], there is significant apportionment in this case. Dr. Nagelberg has determined that 50% of Mr. Gonzalez's impairment to his shoulders, hands, wrists, and fingers is non-industrial. The psoriatic arthritis is 50% non-industrial per Dr. Levine and 75% non-industrial per Dr. O'Neill. The GERD stems from the psoriatic arthritis medications, so would be 50% as well (75% non-industrial per Dr. O'Neill). Finally, Dr. O'Neill has found the sleep problems and coronary artery disease to be entirely non-industrial and apportions 75% of the hypertension to other factors. ¶ … Mr. Gonzalez is in a rather unusual situation in that none of his impairments by themselves preclude him from working in the open labor market. However, he has so many separate issues that when combined, the industrial portions alone make him not amenable to rehabilitation. Conversely, if he only had the non-industrial impairments, these would be labor-disabling and preclude him from working by themselves.
> (App. Exh. 1, Paul Broadus, October 12, 2020, p. 20.)

"[B]ased on records and the *LeBoeuf* Analysis report issued by the applicant's expert," defendant's Vocational Expert, Aida Y. Worthington, issued a Vocational Evaluation. (Def. Exh. J, Aida Y. Worthington, August 12, 2021, p. 1.) In the Vocational Conclusions section of her report, Ms. Worthington noted:

> I find Mr. Gonzalez to be able to return to work and compete in the open labor market. Mr. Gonzalez is "*amenable*" to vocational rehabilitation through direct placement and/or through short term or long-term vocational retraining … ¶ … After conducting this Vocational Evaluation, the Transferable Skills Analysis for Mr. Gonzalez, and reviewing the above indicated medical reports, and the overall work restrictions based on LC § 4660 (b) (2), Mr. Gonzalez has not experienced 100% Diminished Future Earning Capacity.
> (Def. Exh. J, pp. 67 – 68, italics in original.)

Earlier in her report, Ms. Worthington explained:

> From a vocational standpoint, Mr. Gonzalez does have critical impairments and limitations that significantly affect his ability to return to work, because of his overall medical condition. However, Mr. Gonzalez already had critical medical conditions that might have eventually led to the current medical condition that he is in at this time, not only based on his CT industrial injury, but also based on the way he cared and managed said medical conditions. ¶ Mr. Gonzalez already had pre-existing and uncontrolled "malignant hypertension from day one" as testified by AME Dr. O'Neil in his deposition dated 112812020. He also had a history of psoriatic arthritis, coronary artery disease, and sleep apnea, which were allegedly partially aggravated by the CT industrial injury, which could have aggravated them, as well as, time, aging, lifestyle, and the medical treatment noncompliance.
> (Def. Exh. J, p. 38.)

This matter was set for trial on July 14, 2021, and was continued to September 22, 2021. It was continued by stipulation of the parties to September 29, 2021, and was stipulated to be continued again by the parties to October 13, 2021. At the October 13, 2021 trial the parties stipulated that applicant sustained injury AOE/COE to his heart, upper extremities, spine, and lower extremities; that "The start date for permanent disability is 11/29/2012;" that "Applicant asserts he is 100 percent permanently totally disabled" and "Defendant asserts that, Applicant's permanent disability is 86%;" the issues included temporary disability [applicant claiming the periods "from 7/1/2011 through 9/11/2013 and … 5/15/2014 through 2/7/2018"], permanent disability, and attorney fees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 13, 2021, pp. 2, 3 – 4.) The trial was continued and at the December 22, 2021 trial it was submitted for decision. (MOH, December 22, 2021.)

DISCUSSION

Pursuant to Labor Code section 4663:

> (b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.
> (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other

> factors both before and subsequent to the industrial injury, including prior industrial injuries. …
> (Lab. Code, § 4663(b) and (c).)[3]

The Appeals Board must rely on expert medical opinion in determining apportionment; apportionment is a medical determination, and a non-medical opinion is not substantial evidence. (*Zemke v Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358]; *Fresno Unified School. District v Workers' Comp. Appeals Bd. (Stephens)* (2006W/D) 71 Cal.Comp.Cases 1505.) As noted above, section 4663 requires the reporting physician to make an apportionment determination, and subsection 4663(c) describes the standards the physician must use. (Lab. Code, § 4663(c).) However, section 4663 does not identify collateral sources of expert opinion as to apportionment, nor does it not authorize the application of any other standard of apportionment. In our recent en banc decision, we explained:

> Accordingly, "vocational apportionment" offered by a non-physician is not a statutorily authorized form of apportionment. In addition, apportionment determinations that deviate from the mandatory standards described in section 4663(c) are not a valid basis upon which to determine permanent disability. (*Grace Nune*s v. *State of California, Dept. of Motor Vehicles* (2023) … Cal.Comp.Cases … [2023 Cal.Wrk.Comp. LEXIS … [ADJ8210063; ADJ8621818] (Appeals Board en banc) (*Nunes*); see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal.Wrk.Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*).)

Here, applicant's vocational rehabilitation counselor, Mr. Broadus, discussed the factors of apportionment discussed by Dr. Nagelberg and Dr. O'Neill, but he then stated that:

> [Applicant] has so many separate issues that when combined, the industrial portions alone make him not amenable to rehabilitation. Conversely, if he only had the non-industrial impairments, these would be labor-disabling and preclude him from working by themselves.
> (App. Exh. 1, p. 20.)

It appears that notwithstanding the apportionment described by Drs. Nagelberg and O'Neill, it is Mr. Broadus' opinion that applicant is 100% disabled as a result of his industrial cumulative injury. Clearly, his opinion is not consistent with the statutory and case law discussed above. (Lab. Code, § 4663(c); *Nunes, supra; Escobedo, supra.*) Thus, the reports from Mr. Broadus do not constitute substantial evidence.

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

Further, as quoted above, defendant's vocational expert Ms. Worthington stated her opinion that although applicant had "critical impairments and limitations that significantly affect his ability to return to work;" … "Mr. Gonzalez already had critical medical conditions that might have eventually led to the current medical condition that he is in at this time, not only based on his CT industrial injury, …." (Def. Exh. J, p. 38.) It appears that Ms. Worthington's opinion is based on her speculating as to the extent that applicant's non-disabling pre-existing conditions might have progressed absent the industrial injury. It has long been the law that a medical opinion is not substantial evidence if it is based on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93].) More importantly, Ms. Worthington prepared and issued her report, acting in the capacity of a "vocational expert" not a medical expert. Therefore, her conjecture as to the medical conditions causing applicant's disability is not substantial evidence.

A disability rating obtained pursuant to the permanent disability rating schedule (PDRS) may be rebutted by showing an applicant's future earning capacity is diminished at a level greater than that reflected in the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd.* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119].) It is appropriate that evaluating physicians consider the vocational evidence as part of their determination of permanent disability, including factors such as whether an injured worker is feasible for vocational rehabilitation. (*Ogilvie, supra.*) We note that neither AME was provided the reports from the parties' vocational experts to review.

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.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) As discussed herein, the reports from the parties' vocational experts do not constitute substantial evidence and in turn, cannot be the basis for determining applicant's disability caused by the industrial injury. Also, Dr. Nagelberg and Dr. O'Neill did not review said reports. Based thereon, the record does not contain substantial evidence pertaining to whether applicant is amenable to vocational rehabilitation.

Finally, our review of the record indicates that although the parties stipulated that "the start date for permanent disability is 11/29/2012," applicant is claiming he is entitled to temporary disability indemnity for the periods from July 1, 2011, through September 11, 2013, and from May 15, 2014, through February 7, 2018. Also, the parties stipulated that the EDD paid applicant disability benefits from April 2, 2010, through June 20, 2010. These inconsistencies in the record raise the issue of what is the actual start date for permanent total disability benefits to be paid, if applicant is ultimately found to be 100% disabled. (*Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550, 562 [2014 Cal. Wrk. Comp. LEXIS 69] (Appeals Bd. en banc).) Again, if applicant is found to be permanently totally disabled as a result of his industrial injury, the parties must address this issue.

The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Under the factual and procedural circumstances discussed herein, it is appropriate that we return this matter to the WCJ and for the parties to develop the record so that it contains substantial evidence regarding applicant's disability caused by the cumulative injury he sustained while employed by defendant.

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 January 18, 2022 Findings, Award and Order 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/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 11, 2023

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

RIGOBERTO GONZALEZ
ROSE, KLEIN & MARIAS
DIETZ, GILMOR & CHAZEN

TLH/mc

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