WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DONNA MONTANO, *Applicant*

vs.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, legally self-insured, adjusted by STATE COMPENSATION INSURANCE FUND/ STATE CONTRACTS, *Defendants*

Adjudication Number: ADJ1988087 (GOL 0094919)
Santa Barbara District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Award of December 31, 2020, the workers' compensation administrative law judge ("WCJ") found, in relevant part, that during the period April 3, 1976 through January 6, 2003, applicant sustained industrial injury to her brachial plexus and thoracic outlet syndrome, causing permanent disability of 97% after apportionment.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the WCJ erred in finding apportionment, and that the overall record justifies a finding of permanent and total disability. Specifically, applicant alleges that the medical opinion of Dr. Fink, the Agreed Medical Evaluator ("AME") in neurology, is not substantial evidence of apportionment of disability caused by applicant's headaches, and that the medical opinion of Dr. Stanwyck, the AME in psychiatry, is not substantial of apportionment of applicant's psychiatric disability. Applicant further alleges that the vocational opinion of her expert, Dr. Van Winkle, justifies a finding of permanent and total disability on account of her orthopedic disability alone,

[1] Commissioner Marguerite Sweeney signed the Opinion and Order Granting Petition for Reconsideration dated May 11, 2021. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

which is not apportionable according to her treating physicians, Dr. Montgomery and Dr. Moelleken. Applicant also alleges that even assuming there is some basis for apportionment, the WCAB has discretion to find that applicant's injury resulted in permanent and total disability due to the severity of her medical conditions, and that a finding of permanent and total disability is justified by Dr. Van Winkle's opinion that there is no "vocational apportionment."[2]

Defendant filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

At the outset, we observe that the Appeals Board has 60 days within which to act on a petition for reconsideration. (Lab. Code, § 5909.) Here, through no fault of the applicant, her petition for reconsideration did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process and common sensibilities, we conclude that the running of the 60-day statutory period for reviewing and acting upon the applicant's petition for reconsideration was tolled for a reasonable period of time after the Board received actual notice of it. (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd.* (*Felts*) (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)[3]

Turning to the merits, we note that "the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further [inquiry or] evidence." (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 [66 Cal.Comp.Cases 1290].) In this case, we are persuaded that further inquiry and evidence is required on the issues of permanent disability and apportionment. Therefore, although we will affirm the undisputed parts of the WCJ's decision, we will rescind the WCJ's findings on

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[2] This opinion will not address applicant's allegation that there is no "vocational apportionment" because the allegation now has no legal validity. (See *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (2023 Cal. Wrk. Comp. LEXIS 30) [Appeals Board en banc] ("*Nunes* I"); *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 (23 Cal. Wrk. Comp. LEXIS 46) [Appeals Board en banc] ("*Nunes* II").

[3] In *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213 [89 Cal.Comp.Cases 1], the Second District Court of Appeal (Div. Seven) concluded that the language and purpose of Labor Code section 5909 show a clear legislative intent to terminate the Appeals Board's jurisdiction to consider a petition for reconsideration after the 60 days afforded by section 5909 have passed, and therefore decisions on a petition for reconsideration made after that date are void as in excess of the Board's jurisdiction. The Court's opinion in *Zurich* reflects a split of authority on application of the "*Shipley*" principle. However, the Court in *Zurich* did not indicate that its decision applies retroactively in all cases. In the instant case, we follow *Shipley*.

permanent disability and apportionment, and we will return this matter to the trial level for further proceedings and new decision on those issues by the WCJ.

In the "Facts" section of his Report, the WCJ provides a brief description of the relevant facts:

> The facts are not in significant dispute. Applicant has undergone three (3) failed back surgeries resulting in a three-level fusion. Applicant has sustained psychological injury as a result of the orthopedic injury.
>
> Following the issuance of a Findings and Award of 97%, Applicant filed this petition for reconsideration contending Applicant is 100% permanently totally disabled.

Further, the WCJ states on page two of his Report that the medical and vocational evidence[4] demonstrate that applicant's overall disability is permanent and total. We agree, but we are persuaded that the WCJ must revisit his finding that due to apportionment, applicant's permanent disability is 97% rather than 100%.

Isolating the issue of permanent disability to start,[5] we conclude that the record raises issues requiring further inquiry and resolution. The WCJ's rating instructions dated December 30, 2020 show that to obtain a recommended rating for applicant's upper extremity disability, the WCJ relied upon the objective and subjective factors of disability set forth in Dr. Montgomery's treatment report of February 1, 2016. (Exhibit 4, p. 6.) For the subjective factors of disability, the doctor listed applicant's complaints of pain in her arms and hands; for the objective factors the doctor found that applicant lost 75% of her grip in both hands. However, Dr. Montgomery diagnosed applicant with thoracic outlet syndrome, and it is not clear that the doctor included any subjective or objective factors resulting from thoracic outlet syndrome in his evaluation of permanent disability.

We find a similar unresolved issue in connection with the WCJ's reliance upon Dr. Moelleken's February 19, 2016 treating report to rate applicant' spinal disability. (Exhibit 1, p.

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[4] It is well-settled that for all dates of injury, the presentation of substantial vocational evidence offers a legal path to rebuttal of the scheduled permanent disability rating. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (2023 Cal. Wrk. Comp. LEXIS 30) [Appeals Board en banc], citing *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587] and *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624].)

[5] It is undisputed that the 1997 Schedule for Rating Permanent Disabilities ("PDRS") applies to the rating of applicant's permanent disability in this matter.

3.) Treating applicant for her cervical, thoracic and lumbar spine complaints, Dr. Moelleken found that she is limited to light work due to her cervical spine problems, and that she is precluded from heavy lifting due to her thoracic and lumbar spine problems. Although the preclusion from heavy lifting for applicant's thoracic and lumbar spine conditions is overlapped by the restriction to light work for her cervical condition, we note that like Dr. Montgomery, Dr. Moelleken apparently did not consider applicant's thoracic outlet syndrome because it was not included in the diagnoses listed in Dr. Moelleken's February 19, 2016 report.

To the end that the record includes a full evaluation of the nature of applicant's orthopedic disability, we conclude that further development of the medical evidence is required. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].) The WCJ should obtain supplemental reports from Dr. Montgomery and Dr. Moelleken to determine what additional factors of disability, if any, have resulted from applicant's brachial plexus injury and thoracic outlet syndrome. This additional inquiry is required because in the decision at issue, the WCJ found that the brachial plexus injury and thoracic outlet syndrome are industrial conditions, but their potential contribution to applicant's overall orthopedic disability has not been addressed. Further, once the actual work limitations for all of applicant's orthopedic conditions are ascertained, the vocational experts can more specifically address what is significant on a vocational basis. In this regard, we note the WCJ's Report is not responsive to applicant's allegation that the medical and vocational evidence justifies a finding of permanent and total disability, without apportionment, based on her upper extremities and spinal problems alone. In further proceedings at the trial level, the WCJ should revisit this issue and resolve it. (See *County of L.A. Dep't of Children's Servs. v. Workers' Comp. Appeals Bd.* (*LeCornu*) (2009) 74 Cal.Comp.Cases 645 (writ den.) [permanent and total disability found due to applicant's preclusion from open labor market, notwithstanding 96% formal rating based on AMEs' apportionment opinions]; *McGinnis v. Coalinga-Huron Sch. Dist.* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 372 [same result in case involving application of 2005 PDRS].)

We also find unresolved issues pertaining to apportionment. Dr. Fink, the AME in neurology, opined in his report dated January 22, 2019 that applicant "does have a prior personal and family history of headache…but alleges [her] industrial injuries aggravated the baseline complaint. Given this information, 80% is apportioned to the industrial injuries alleged and 20%

is apportioned to non-industrial factors." The doctor added, "[t]hese opinions are given with full knowledge of the *Escobedo* ruling." (Exhibit 27, report page 12.)

However, Dr. Fink's acknowledgment of the Appeals Board's en banc opinion in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 does not in itself mean that the doctor's opinion on apportionment is substantial evidence. In fact, Dr. Fink's opinion on apportionment raises a few questions. Dr. Fink did not describe applicant's "prior personal and family history of headache" in any detail, and the doctor did not offer a diagnosis identifying the nature of the pre-existing headaches. For this reason, it is unknown whether the headaches caused by applicant's industrial conditions are of the same nature as the allegedly pre-existing headaches, which would raise the possibility of valid apportionment.

Further, in order to constitute substantial evidence of apportionment, a medical opinion must "describe in detail the exact nature of the apportionable disability," among other required elements. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 [Appeals Board en banc].) Here, Dr. Fink's opinion as set forth above did not describe in detail the exact nature of the apportionable disability. Nor did the doctor explain how and why applicant's "prior personal and family history of headache" was causing permanent disability at the time of his evaluations dating back to 2018 and early 2019. Further, Dr. Fink did not explain how he concluded that 20% of applicant's headache disability is non-industrial. Therefore, absent the possibility that applicant's orthopedic injuries alone caused permanent and total disability, the WCJ must revisit whether Dr. Fink's opinion in neurology is substantial evidence of apportionment. The WCJ may further develop the record as he deems necessary or appropriate. (See *McDuffie, supra.*)

We have similar concerns about the apportionment opinion of Dr. Stanwyck, the AME in psychiatry. Dr. Stanwyck's opinion on apportionment dates back to his report of December 28, 2015. In that report, Dr. Stanwyck apportioned 70% of applicant's psychiatric disability to her industrial orthopedic injury and chronic pain, and 30% to the alleged non-industrial factors of "recent stressors" due to the recent death of applicant's father, a "contentious inheritance" with her siblings, and uterine cancer for which applicant was treated aggressively but in remission at the time of Dr. Stanwyck's evaluation. In apportioning 30% of psychiatric disability to those factors, it appears the doctor was apportioning to temporary stressors rather than to applicant's *permanent* disability. We note that at trial on August 20, 2020, applicant testified that her treatment for cancer ended in November 2015, and that she did not have any treatment for cancer

thereafter. Since applicant's cancer evidently never returned, it is unclear how it could be a permanent factor in evaluating the causes of applicant's psychiatric disability. This also may be true of the temporary stress that applicant endured upon her father's death in 2014 and the "contentious inheritance" that followed. As with Dr. Fink's opinion on apportionment, we conclude that the WCJ must revisit the substantiality of Dr. Stanwyck's opinion on apportionment and further develop the record to the extent the WCJ deems it necessary or appropriate.[6] (See *McDuffie, supra.*)

In summary, we conclude that the unresolved issues relating to permanent disability and apportionment must be revisited and resolved by the WCJ in further proceedings at the trial level, in accordance with our discussion above. As noted before, the WCJ should further develop the record as necessary to address the outstanding issues. However, we express no final opinion on permanent disability or apportionment. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of December 31, 2020 is **AFFIRMED**, except that Findings 2, 3 and 7, and paragraphs (B) and (E) of the Award are **AMENDED** to reflect as follows:

FINDINGS OF FACT

2. The issue of permanent disability is deferred, with jurisdiction reserved at the trial level.

3. The issue of apportionment is deferred, with jurisdiction reserved at the trial level.

7. The issue of attorney's fees is deferred, with jurisdiction reserved at the trial level.

[6] It is apparent that Dr. Stanwyck's medical opinion was stale when this matter was submitted for decision.

AWARD

(B) The award of permanent disability is deferred, with jurisdiction reserved at the trial level.

(E) The award of attorney's fees is deferred, with jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on the outstanding issues, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 23, 2024

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

DONNA MONTANA
HOURIGAN, HOLZMAN & SPRAGUE
STATE COMPENSATION INSURANCE FUND

JTL/*ara*

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