

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ERIC ALVAREZ, *Applicant*

vs.

**MICROSOFT CORPORATION; NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA; administered by GALLAGHER BASSETT SERVICES, INC.,
*Defendants***

**Adjudication Number: ADJ9053614
Santa Ana District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which is adopted and incorporated herein, and for the reasons stated below, we will deny reconsideration.

Labor Code section 4663(a) provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Section 4664(a) states that "[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).) The defendant has the burden of proof on the issue of apportionment. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].) For the reasons stated by the WCJ in the report, we agree that defendant did not meet that burden here.

The opinion of panel qualified medical examiner (PQME) Dmitriy Sherman, M.D., is not substantial medical evidence supporting a finding of apportionment. (*Heggin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) [a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based

on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions].) In order to consist of substantial medical evidence on the issue of apportionment, a medical opinion

[M]ust be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.

For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.

And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621-622 (Appeals Board en banc).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 25, 2021

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

**ERIC ALVAREZ
LAW OFFICES OF JESSE A. MARINO
ALBERT & MACKENZIE**

PAG/pc

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

**REPORT AND RECOMMENDATION OF WORKERS'
COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

1. APPLICANT'S OCCUPATION: Sales / Tech Solutions
Profession
MANNER INJURY ALLEGED: Stress-related
BODY PARTS ALLEGED: Psyche
2. PETITIONER: Defendant
PETITION FILED TIMELY: Yes, on April 26, 2021
PETITION VERIFIED: Yes
ANSWER FILED: Yes, on May 2021
3. FINDINGS AND ORDER DATE: April 6, 2021
PORTIONS APPEALED: Findings of Fact #7 that the applicant meets the criteria for total permanent disability under *Leboeuf* on an industrial basis, Findings of Fact #8 that Dr. Sherman's allocation of 10 percent non-industrial apportionment is not substantial medical evidence, and Findings of Fact #9 that the applicant is entitled to permanent total disability.
4. PETITIONER'S CONTENTIONS: Petitioner contends: The WCJ erred by concluding that the panel QME's opinion on apportionment is not supported by substantial evidence. The vocational expert Laura Wilson's reports are not substantial vocational evidence. The applicant failed to rebut the permanent disability rating schedule because he did not establish his employment was the sole cause of his not being amenable to vocational rehabilitation. The applicant is entitled to an Award of 53% permanent disability.

**II.
FACTS**

- (1) While employed by Microsoft Corporation, the applicant experienced anxiety, sleep, and depression due to long work hours (MOH/SOE 5: 24 – 25). In March 2013, he felt he could no longer handle the job stress (MOH/SOE 6: 8) and went to see his private doctor, Dr. George Jung. He complained of being micromanaged by his boss and working seven days a week over the past months. Dr. Jung took him off work, and the applicant has not returned to work since then (MOH/SOE 6: 13 – 15).

- (2) In November 2014, the applicant saw the panel QME in psychiatry, Dr. Dmitriy Sherman. Dr. Sherman noted the applicant experienced job overload and a corresponding breakdown of all psychological coping mechanisms, which caused psychotic depression and panic disorder. (Dr. Dmitriy Sherman, Report dated November 17, 2014, Causation, pg. 46 [Joint Exh. 3]). The applicant had hypomanic/manic symptoms, depression, delusions, and hallucinations as a result of his employment. The applicant's delusional preoccupation with computers in combination with manic and hypomanic symptoms as well as severe impairment in functioning were consistent with a "combo" diagnosis of schizoaffective disorder, bipolar type (Dr. Dmitriy Sherman, Report dated November 17, 2014, pg. 51 [Joint Exh. 3]).
- (3) Dr. Sherman opined that 10 percent of the applicant's psychiatric impairment was due to unresolved grief from the death of his mother. The remaining 90 percent of impairment directly resulted from the industrial injury AOE/COE (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, apportionment, pg. 51 [Joint Exh. 3]). Dr. Sherman apportioned 10 percent non-industrial even though he only briefly discussed the mother's passing in 2010, and although he noted the impact of the mother's passing did not cause the applicant depression (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, causation, pg. 46 [Joint Exh. 3]). He apportioned although the applicant said he was okay about it, did not have a problem, and said, "Everybody has to die." (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, pg. 26 [Joint Exh. 3]).
- (4) The parties deposed Dr. Sherman in July 2015, at which time he confirmed the applicant's hallucinations were extensively documented in the medical records. He still apportioned 10 percent to preexisting disability because the applicant's mother died due to brain cancer. The applicant heard his mother's voice talking to him (Deposition of Dmitriy Sherman dated July 24, 2015, 10: 20 – 22 [Joint Exh. 5]).
- (5) Dr. Sherman re-evaluated the applicant on October 5, 2018. He noted that the applicant was doing the same, and he continued to hear voices and sometimes mumbling. He heard people coming to get him and get rid of him. (Dr. Dmitriy Sherman, Panel report dated October 5, 2018, pg. 97 [Joint Exh. 2]). The applicant was diagnosed with schizoaffective disorder, bipolar type, panic disorder, and a G.A.F. score of 48. (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, Diagnostic Impression, pg. 110 [Joint Exh. 2]).
- (6) According to the panel QME, the applicant has not been able to perform his regular work duties since March 2013, and that "has not been able to

compete in an open labor market due to ongoing symptoms of schizoaffective and panic disorders causing severely disabling symptoms (Dr. Dmitriy Sherman, Panel report dated October 5, 2018, Disability, pg. 113 [Joint Exh. 2]). The applicant's level of psychiatric disability was total temporary disability beginning March 2013 until the date of his October 5, 2018 examination (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, disability, pg. 113 [Joint Exh. 2]). It is "unlikely that applicant will ever return to work." (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, Prophylactic Work Restrictions, pg. 114 [Joint Exh. 2]).

- (7) Regarding apportionment, Dr. Sherman did an about-face as to its cause, stating the following: "I agree with applicant's attorney criticism during my cross-examination in regards to giving apportionment for applicant hearing voices of his deceased mother. This factor is not apportionable." (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, Apportionment, pg. 117 [Joint Exh. 2]). However, Dr. Sherman instead apportioned 10 percent to an increase hallucinations the applicant was having when he underwent radiation treatment for cancer in late 2017.

III. DISCUSSION

APPORTIONMENT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In his initial report of November 17, 2014, the panel QME opined that the death of the applicant's mother from brain cancer affected the applicant's coping mechanisms and caused 10 percent of the applicant's permanent disability. Dr. Sherman apportioned 10 percent of the psychiatric impairment because the applicant heard the voice of his mother. (Dmitriy Sherman, M.D, report of November 17, 2014, Apportionment pg. 51 [Joint Exh. 3]). In the copious volume of mental health records reviewed by Dr. Sherman, there is no mention of the applicant having problems coping with his mother's passing. The panel QME's interview of the applicant suggests the applicant's dealt well with his mother's passing. Dr. Sherman notes the death of the applicant's mother in 2010 did not cause the applicant overt depression (Dmitriy Sherman, M.D, report of November 17, 2014, Causation pg. 46 [Joint Exh. 3]). The medical records do not mention any mental health treatment or counseling related to the incident.

In his supplemental report of October 5, 2018, Dr. Sherman changed his opinion on apportionment. He opined that the 10 percent apportionment he previously assigned for the applicant hearing voices of his deceased mother was an error as the factor was "not apportionable." (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, apportionment, pg. 117 [Joint Exh. 2]). Instead, the panel QME apportioned 10 percent of the psychiatric impairment to a cancer diagnosis in 2017, and increased hallucinations related

to radiation treatment. This occurred four years after the applicant last worked. (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, apportionment, pg. 117 [Joint Exh. 2]).

The apportionment to cancer radiation and hallucinations during radiation treatment in 2017 is unusual because the applicant already had severe hallucinations years before the cancer diagnosis and treatment. For example, when the applicant saw psychiatrist Dr. Navin Adatia in April 2013, he complained of poor concentration and occasionally heard mumbling sounds when there was no one. (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, pg. 8 [Joint Exh. 3]). The applicant saw Dr. Adatia again in June 2013 and was having episodes of severe anxiety. (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, pg. 10 [Joint Exh. 3]). When the applicant saw Dr. Jung in June 2013, he hallucinated and heard voices talking who were not there (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, pg. 11 [Joint Exh. 3]).

In June 2013, Dr. Adatia reported the applicant was having auditory hallucinations and hearing mumbling sounds. The applicant was anxious, and he was thinking something terrible was going to happen. In July 2013, Dr. Adatia reported the applicant could not understand what people were saying. He could not carry on a conversation (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, pg. 11 [Joint Exh. 3]). When the applicant drove to Dr. Adatia's office for an appointment in August 2013, he had to stop 10 to 12 times due to anxiety and paranoia. He feared his ex-boss and coworkers were going to kill him. He thought his mother, who died three years ago, was talking to him.

A medical note from November 2013 indicates the applicant was not able to be left alone. He was confused, needed direction getting dressed, help to empty the dishwasher, had paranoid ideations, and felt overwhelmed with an urge to stay in bed each day (Dr. Dmitriy Sherman, Re-Examination in Psychiatry dated October 5, 2018 pg. 16 [Joint Exh. 2]). In his December 2013 report, Dr. Adatia indicated the applicant was unable to drive, he was staying in bed most of the time, and he could not do the simplest chores at home. (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, pg. 11 [Joint Exh. 3]). In May 2014, the applicant said he had visual hallucinations of people arguing, bleeding, and coming after him. He had an auditory hallucination that people were going to get him. The diagnoses included major depression with psychosis and post-traumatic stress disorder (Dr. Dmitriy Sherman, Panel Qualified Medical Examination in Psychiatry dated November 17, 2014, pg. 19 [Joint Exh. 3]).

The applicant's mental health problems worsened well before the 2017 bought with cancer. In May 2014, he complained of increased tactile

hallucinations, where he felt there were bugs on him. His auditory hallucinations became paranoid ideation, thinking, "They want you dead." (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, pg. 27 [Joint Exh. 2]). In April 2015, he was reporting increased auditory, visual, and tactile hallucinations. (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, pg. 49 [Joint Exh. 2]). He was preoccupied with people following him and thought they would kill him (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, pg. 19 [Joint Exh. 2]). When he saw the doctor again in August 2015, he was disheveled and had anxiety, depression, paranoia, and visual hallucinations of injured people, spiders, and rats. He had auditory hallucinations believing they were going to get him. He had a poor sleep, concentration, and attention, and he was afraid to go out. (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, pg. 76 [Joint Exh. 2]).

In 2016 he could not dress independently, could not tie his shoes, had a flat affect, was feeling tired and depressed, was anxious, had paranoia, had visual hallucinations, and was disheveled. (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, pg. 81 [Joint Exh. 2]). In 2017, Dr. Adatia re-evaluated the applicant, who was experiencing paranoia and hallucinations, his appearance was still disheveled, and he was depressed and anxious. (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, pg. 27 [Joint Exh. 2]). By 2017, the applicant could not work and struggled with severe mental illness that had progressively worsened since 2013. Indeed, the panel QME states that the applicant was temporarily totally disabled for the entire period from 2013 until 2018.

The panel QME did not review records related to treatment for cancer in 2017. One does not know the extent and severity of the applicant's cancer, how long he received treatment, or anything about the applicant's prognosis related to cancer. One does not know how long the applicant had hallucinations due to radiation treatment and whether it lasted an hour, a day, or a longer time. There is no documentation or further elaboration of how much or how long the applicant's hallucinations supposedly increased. The panel QME's apportionment to the hallucinations during radiation treatment is no more convincing than his apportionment to the hallucinations when the applicant was hearing his mother's voice. Attempts to apportion to hallucinations of his mother's voice, and hallucinations during treatment for cancer suggest the doctor was not applying apportionment correctly.

The evidence establishes that the applicant's psychiatric injury caused him to experience auditory, visual, and tactile hallucinations ever since 2013 on an industrial basis. The panel QME did not explain the relationship between the industrially related hallucinations, which worsening from 2013 through 2017, and the hallucinations that supposedly increased in 2017 with radiation treatment.

Although Petitioner mentioned a failed appendectomy procedure when his appendix exploded, the panel QME did not apportion to the appendectomy, and it is not an apportionment factor.

The little information the panel QME base his apportionment on is in a single paragraph of the report where the applicant states that: "it [the cancer treatment] was not mental stuff. He had surgery and radiation treatment. According to the applicant, the surgery was easy, but radiation was difficult to tolerate. Everything was okay concerning surgery except for a tube they place in him. The surgery did not hurt. His hallucinations increased when he was getting radiation. His oncologist cared for him a lot." (Dmitriy Sherman, M.D. report of October 5, 2018, pg. 97 [Joint Exh. 2]). The above paragraph is the only record reviewed to support apportionment.

The facts herein are similar to those in the panel decision Aguila v. Fullmer Constr. Co., 2013 Cal. Wrk. Comp. P.D. LEXIS 468 (Panel Decision), where the W.C.A.B. found that the applicant was entitled to an unapportioned 100 percent permanent total disability award and that the agreed medical examiner's apportionment was not substantial evidence to support 15 percent apportionment. The A.M.E.'s apportionment was inconsistent because the A.M.E. changed his opinion without sufficient explanation, and did not adequately explain the role of non-industrial factors in the level of disability.

The panel QME's apportionment is not based on substantial evidence described in Escobedo v. Marshalls, C.N.A. Ins. Co., 70 Cal. Comp. Cases 604, 2005 Cal. Wrk. Comp. LEXIS 71 (W.C.A.B. April 19, 2005). He changed his opinion regarding apportionment with very little explanation, and he failed to support apportionment to the subsequent diagnoses of cancer and increased hallucinations. He seems not to understand the principles of apportionment since by late 2017, the applicant had already been having hallucinations for several years. The panel QME's apportionment determination is speculative with little or no supporting evidence.

AMA RATING REBUTTED BY VOCATIONAL EVIDENCE

According to Dr. Sherman, the applicant's G.A.F. score is 48, and the whole person impairment rating is 34 percent (Dr. Dmitriy Sherman, Re-Examination Report dated October 5, 2018, Disability Rating, pg. 116 [Joint Exh. 2]). This rates out: $13.06.00.00 - 34 - [1.4]48 - 2511 - 57 = 59$ percent. There is, however, little expectation that the applicant will be able to return to work. According to Dr. Sherman, "It's unlikely that applicant will ever return to work. He is on social security for his serious mental disorder." (Dr. Dmitriy Sherman, Re-Examination Report dated October 5, 2018, Prophylactic Work Restrictions, pg. 114 [Joint Exh. 2])

When Dr. Sherman was deposed, he said, "No. I'm not saying he is able to return to work. He has a moderate psychiatric disability" (Dr. Dmitriy Sherman, Deposition transcript dated July 24, 2015, 13: 3 - 4 [Joint Exh. 5]). The applicant's prognosis is poor, according to Dr. Sherman. "From a pure psychiatric perspective, the applicant is not capable of returning to his regular and customary occupation and employment activities." (Dr. Dmitriy Sherman, Re-Examination Report dated October 5, 2018, pg. 118 [Joint Exh. 2])

The vocational expert medical evidence consists of reports from Laura Wilson (Applicant's Exhs. 1, 2) and Paul Broadus (Defense Exh. A). Both vocational experts interviewed the applicant and identified significant roadblocks to the applicant benefitting from vocational rehabilitation successfully, such as extensive medication usage and the applicant's difficulty performing daily living activities as straightforward as tying his shoelaces. They reviewed the medical reports of the panel QME, Dr. Dmitriy Sherman. They examined the applicant's history of depression, paranoia, trouble concentration, nightmares, hallucinations, fitful sleep, negative symptoms, and psychotic mental disorder.

Laura M Wilson concludes, "Mr. Alvarez is not amendable to vocational rehabilitation ... Mr. Alvarez has at present no consistent and stable future earning capacity" (Laura M Wilson, 11/01/2019, pg. 33 [Applicant's Exh. 1]). Her counterpart, Paul Broadus, likewise concludes, "Taking all of this into consideration, it seems clear that based on Dr. Sherman's current opinion, Mr. Alvarez is not amenable to rehabilitation and is not employable in the open labor market." (Paul Broadus, LeBoeuf Analysis dated 04/13/2020, pg. 14 [Defense Exh. A])

Laura Wilson states the applicant is not amenable to vocational rehabilitation. Moreover, "Even if non-industrial apportionment is found, in my opinion, the applicant has a 100 percent permanent disability as a direct result of the industrial injury." (Laura Wilson, report dated November 1, 2019, pg. 25 [Applicant's Exh. 2]). Paul Broadus notes that considering Dr. Sherman's opinions, the applicant is not amendable to rehabilitation. However, given the apportionment to non-industrial factors, it is unclear if this is due solely to his industrial impairments, and Mr. Broadus leaves it to the Trier-of-Fact to determine if the industrial injuries are entirely responsible for the applicant's inability to work (Paul Broadus, report dated 04/13/2020, pg. 14 [Defense Exh. A]).

Petitioner contends Laura Wilson's vocational report is not substantial evidence because she refers to the applicant's orthopedic pain, and the Court made no finding of any orthopedic injury. However, the only medical reports Laura Wilson reviewed were from Dr. Dmitriy Sherman, the psychiatrist. She did not review any orthopedic reports and did not consider the applicant's orthopedic complaints in her vocational assessment. As Dr. Dmitriy Sherman

makes clear, it is from a "pure psychiatric perspective [that] applicant is not capable of returning to his regular and customary occupation and employment activities." (Dr. Dmitriy Sherman, Panel Re-Examination in Psychiatry dated October 5, 2018, prognosis, pg. 118 [Joint Exh. 2]).

Applicant's injury to his psyche resulted in 100 percent permanent disability without apportionment because the applicant's attorney established through vocational expert evidence and the panel QME report that the applicant lacks the functional capacity to perform any work and that he is not amenable to vocational rehabilitation under Ogilvie v. W.C.A.B. (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, and LeBoeuf v. W.C.A.B. (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587.

IV. **RECOMMENDATION**

Because of the foregoing, it is respectfully requested that the Petition for Reconsideration filed by Albert and Mackenzie on behalf of the defendants be denied.

DATE: May 21, 2021
Richard Brennen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE