

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

**MAYRA APAC, *Applicant***

**vs.**

**DEUTSCH METAL COMPANY; TRAVELERS INSURANCE, *Defendants***

**Adjudication Numbers: ADJ3496910 (LBO 0364800); ADJ2429049 (LBO 0378171)  
Long Beach District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant Mayra Apac filed her Petition for Reconsideration from the November 10, 2016 Findings of Fact and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a machine operator on August 19, 2004, sustained an industrial injury to her cervical spine, lumbar spine, psyche, and irritable bowel syndrome because of fibromyalgia, resulting in 47% permanent disability. The WCJ found the reporting of Independent Vocational Expert (IVE) Robert Liebman to be substantial evidence. The WCJ also found applicant did not sustain injury to her internal system, jaw, buttocks, bilateral shoulders, arms, feet, sleep disorder, chronic pain, urinary, gastrointestinal and headaches, as alleged. The WCJ awarded an additional period of 24 days of temporary disability, and permanent disability indemnity at the rate of \$200.00 per week for 245 weeks, in the total sum of \$49,000, less credit for sums paid and attorney fees.

Applicant contends that the WCJ erred in finding that the vocational reporting of Mr. Liebman constitutes substantial evidence. Applicant asserts that Mr. Liebman failed to substantiate his conclusion that applicant was not precluded from gainful employment, as he did not perform vocational testing and did not consider the effect applicant's subjective pain and medications had on her potential employability when assessing the work restrictions placed on applicant by the

Agreed Medical Examiners (AME). Applicant next argues that the WCJ erred by finding applicant did not sustain injury to the additional alleged body parts, asserting that a 2009 report by Dr. Levine, the AME in internal medicine, in addition to applicant's testimony, supports a finding that applicant sustained industrial injury to additional body parts due to her fibromyalgia. Finally, applicant contends the WCJ failed to ensure that Mr. Liebman perform comprehensive testing as required by the Appeals Board's January 21, 2016 Decision After Reconsideration. Applicant requests that Mr. Liebman's report be stricken and a new vocational expert be appointed.

We have reviewed defendant's Answer to the Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the WCJ's Findings of Fact and Award, except that we will amend the finding of body parts to include applicant's sleep and arousal disorder.

## **FACTS**

We previously granted defendant's Petition for Reconsideration in this matter and rescinded the October 31, 2013 Findings and Award in ADJ3496910, wherein the WCJ found applicant was permanently totally disabled as a consequence of her industrial injury on August 19, 2004.<sup>1</sup> Defendant challenged the award, contending the medical evidence did not support the WCJ's finding that applicant was 100% permanently disabled, that the WCJ failed to follow the apportionment determinations of the AMEs in psychiatry and internal medicine, and that the WCJ found injury to body parts not supported by the record and are contradicted by the WCJ's Opinion on Decision. Finding the record was not adequate to justify the award, we returned the matter for further clarification from the AMEs as to the extent of applicant's permanent disability. We also found the vocational evidence relied upon was not substantial evidence to support the award, and indicated that it should "be resolved by referring applicant to an agreed vocational expert to

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<sup>1</sup> The Findings and Order in ADJ2429049, wherein the WCJ found applicant did not sustain an industrial cumulative trauma injury and issued a take nothing order, was not disturbed, and became final when no party sought reconsideration from that final order. That case was dismissed per stipulation at the hearing on October 5, 2016. (Minutes of Hearing, 10/5/16, p. 2.)

perform comprehensive testing to determine whether she may be able to participate in the open labor market.”

On June 20, 2014, the WCJ appointed Mr. Robert Liebman to evaluate applicant as an IVE to determine whether applicant was vocationally feasible to return to the open labor market.

Mr. Liebman issued a report of his evaluation on August 25, 2014, and had his deposition taken on October 21, 2014. Additionally, the AMEs, Dr. Seymour Levine in rheumatology, Dr. Lawrence Feiwell in orthopedics, and Dr. Arnold Gilberg in psychiatry, provided supplemental reports in 2015.

Dr. Levine issued a supplemental report on April 3, 2015, in which he reviewed his findings from his earlier evaluations in 2009, when he found applicant sustained injury on August 19, 2004 “resulting in cervical, thoracic and lumbosacral strains as well as a sacrococcygeal strain.” (Ex. GG, 4/3/15 Dr. Levine Supplemental Report, p. 1.) He also diagnosed applicant with “Chronic Regional Myofascial Pain Syndromes involving the musculature of the axial skeleton and bilateral shoulder girdles secondary to the incident of August 19, 2004. I further pointed out that fibromyalgia emerged in this patient secondary to the incident of August 19, 2004 and to the Chronic Regional Myofascial Pain Syndromes that emerged in her secondary to the specific injury.” (Ex. GG, p. 2.)

He found applicant was permanent and stationary as of June 25, 2009, and placed a work restriction limiting applicant to semi-sedentary work, and prophylactic work restrictions:

precluding this patient from working with arms at or above shoulder level on a repetitive basis. Furthermore, I pointed out that she should have the future prophylactic work restriction of not repetitively flexing or extending the head and neck, nor should she hold the head and neck in a fixed or prolonged position. I pointed out that stress may be detrimental to patients with fibromyalgia recommending that she have the future prophylactic work restriction of not being exposed to more than undue amounts of stress in the workplace. Finally, I recommended that this patient should avoid extremes of hot or cold relegating her to working indoors.  
(Ex. GG, p. 3.)

Dr. Levine had rated applicant’s whole person impairment at 37%, taking into consideration her sleep and arousal disorder, emotional disorder, irritable bowel syndrome and chronic pain, “all of which I pointed out were part and parcel of her fibromyalgia syndrome.” (*Ibid.*)

Dr. Levine, in his permanent and stationary report of June 25, 2009, raised the issue of whether applicant would be able to return to the open labor market, based on her industrial injury, including her fibromyalgia. He noted applicant may require a formal work assessment to determine the issue. He did opine that she was a Qualified Injured Worker and a candidate for vocational rehabilitation, being unable to return to her prior work duties. After addressing the issue of her return to work, Dr. Levine indicated that her fibromyalgia condition required work limitations, which he reiterated in his April 3, 2015 supplemental report. He noted that applicant's prophylactic work preclusions were intended to avoid exacerbating or aggravating her fibromyalgia tender points. (Ex. Y, 6/25/09 Dr. Levine Report, p. 28-29.)

Dr. Feiwell, the orthopedic AME, issued a July 21, 2015 supplemental report in which he reviewed his, and the other AMEs, prior and current reporting. He restated his rating of 8% WPI for applicant's low back findings, and noted that he found no other ratable impairment. He stated that from an orthopedic standpoint, applicant's "neck and upper extremity examination was normal and had no impairment rating and I would not apply *Almaraz-Guzman* based upon her emotional overlay. Dr. Levine was asked about medical conditions that were worsened by her injury of 2004 and I will defer to his opinion regarding her fibromyalgia, but on an orthopedic basis she has no evidence whatsoever of an impairment rating with full range of motion." (Ex. CC, 7/21/15 Dr. Feiwell Supplemental Report, p. 5.) He provided a work preclusion of no very heavy work.

Dr. Gilberg, the AME in psychiatry, re-evaluated applicant on October 13, 2015, after he reviewed the reports of the IVE and Dr. Levine and Dr. Feiwell. He diagnosed applicant as suffering from a Depressive Disorder Not Otherwise Specified, Somatic Symptom Disorder Predominantly with Pain, which is persistent, Psychological Factors Affecting Medical Condition, a Sleep Disorder and Sexual Dysfunction Not Otherwise Specified. He assessed applicant with a GAF score of 58, equaling a WPI of 18%. He had previously given her a GAF score of 60. He found her psychiatric injury was predominantly caused by her industrial injury. (Ex. FF, 10/13/15 Dr. Gilberg Report, p. 15.) He apportioned 15% of applicant's psychiatric disability to "non-industrial/pre-existing personal stressors, including her essentially being left by her mother and raised by her grandparents, the loss of an infant, and the issue of her divorce. Furthermore she has a somatoform disorder which has non industrial components. There is an over reaction to physical problems conditioned by her psychological state. I have not made a Axis II diagnosis but one might consider the somatoform disorder to be a reflection of her personality make-up." (Ex. FF, p. 17-18.)

He changed his opinion regarding applicant's ability to return to the workforce, and agreed with the findings of the other AMEs, stating: "I do believe based on the AME reports in Orthopedics and Internal Medicine that the consultee is occupationally feasible." (Ex. FF, p. 15.)

He increased his assessment of applicant's residual work function impairments, noting that applicant's impairment on Function 1, ability to comprehend and follow instructions, went from "very slight" to "slight to moderate on the slight side." For Function 2, ability to perform simple and repetitive tasks, he found applicant's impairment went from "slight" to "slight to moderate on the slight side." For the other six functions, he found applicant's impairment remained "slight." (Ex. FF, p. 18-19.)

Mr. Liebman, the IVE, interviewed applicant, reviewed her medical record and issued a report on August 25, 2014 report. (Ex. AA, 8/25/14 Liebman Vocational Report.) Applicant told Mr. Liebman that she was in constant pain in her coccyx, "all day/every day," with pain levels at 9/10, decreasing to 5-6/10 with medication, but increasing to 8/10 with activities of daily living. She had similar pain complaints in her low back, cervical spine radiating through her shoulders to her upper extremities to her hands. Mr. Liebman stated:

It is noted that the subjective complaints of the applicant are reported as the chief complaints of Ms. Apac herself. In arriving at my findings and conclusions, I have considered the applicant's statements, and relied upon industrial-related factors and substantial medical evidence consistent with the reported findings of the medical examiners in this case, as referred to above; and related the medical evidence to the labor market.

(Ex. AA, 8/25/14 Liebman Vocational Report, p. 8. Emphasis in original.)

Mr. Liebman reviewed the AMEs' diagnoses and work restrictions, including Dr. Levine's findings with regard to applicant's industrial fibromyalgia, noting that:

The fibromyalgia has manifested itself in this patient with widespread pain, nonrestorative sleep, chronic fatigue, symptoms of depression and anxiety, elements of cognitive dysfunction, headaches, a probable irritable bowel syndrome, and temporomandibular joint complaints.

(Ex. AA, p. 4.)

Mr. Liebman also cited Dr. Levine's work restrictions and prophylactic work preclusions. He also quoted Dr. Gilberg's prior opinion that he "did not see how she is occupationally feasible at this time," as a consequence of her psychiatric injury.

The IVE did not conduct any vocational testing during his evaluation, and explained his reasoning as follows:

In many cases it is appropriate to conduct vocational testing as a way to determine transferable skills. This is normally helpful when an individual has not had a long enough work history at any jobs to acquire and demonstrate his/her skills. However, that is not the case here. Ms. Apac has a solid work history as a machine operator, having worked at that occupation for approximately 17 years, 16 of which were with one employer. Vocational testing is unlikely to identify additional skills, which are not already apparent. If such testing were conducted, it would create additional expense without the realistic prospect of providing new data useful in the employability analysis. For this reason, testing was not conducted.

(Ex. AA, p. 10.)

Mr. Liebman concluded that applicant was not permanently totally disabled as she was not precluded from returning to the labor market. He identified several occupations applicant was amenable to perform that fit within the work limitations placed by the AMEs.

I have completed a sequential analysis of Ms. Apac's transferable skills, using empirical data, as referred to in this report. The results included the following occupational titles that Ms. Apac would be able to perform: Information Clerk (and/or related titles), Gate Guard/Attendant, and Surveillance System Monitor. In addition, there are a number of packer and assembler jobs available in Ms. Apac's geographic area, that would be appropriate for the employee within her documented work limitations.

In conclusion, it is my opinion that Ms. Apac would be capable of returning to the open labor market, taking into account the industrially-related factors documented in this report, including her work restrictions/limitations, as outlined by the medical examiners in this report.

(Ex. AA, p. 14.)

In his deposition testimony, Mr. Liebman indicated that his vocational opinion was based upon the AMEs' work restrictions for her industrial injury, including applicant's fibromyalgia diagnosis. He testified that he did not separately consider her subjective pain levels apart from the medical restrictions imposed by the AMEs as a consequence of her industrial fibromyalgia.

Applicant's counsel asked Mr. Liebman to confirm that he "took into consideration the work disability only; correct?" Mr. Liebman responded:

A. I based my opinion on substantial medical evidence. I relied upon the doctors in their areas of specialization to take into account the pain and the medication.

The subjective pain and medications and I relied on the doctors for the impairment from which I could form an opinion as to disability.

Q. In this case it was disability that you were relying on; correct?

A. That's what a vocational expert does is bridges the gap between the impairment, the doctor and relate that to the labor market.

Q. Okay. And in the form of when you do this transferable skill analysis, did you take into consideration fibromyalgia syndrome?

A. That is not a limitation. That is a diagnosis. I took into account what the diagnosis has caused according to the doctor's statements and findings.

Q. Okay. And so you're saying you did not --I want to make it clear now. You did not take fibromyalgia when you were doing your transferable skill analysis; correct?

A. I'm not a medical professional. That's a diagnosis. I leave that to the medical professionals based on their diagnosis and impressions to give me the limitations and that's what I take into account. ...

(Ex. BB, 10/21/14 Liebman Deposition Transcript, 25:11-25; 26:1-12.)

When asked whether applicant's chronic pain would affect her ability to do sedentary work, Mr. Liebman responded, first, that Dr. Levine limited her to semi-sedentary work, and "has taken pain assessment into account."

Dr. Levine is the medical professional in this case with regard to pain. I agree with that. Dr. Levine has taken pain assessment into account. He has also limited the applicant to semi-sedentary work, not sedentary work. I have to go along with Dr. Levine's findings, and I choose to go along with the medical findings.

...

And I have to believe that Dr. Levine presumably took the objective and subjective factors into consideration in his findings, and that's what I'm basing my findings on. The fact that the doctors did that.

(Ex. BB, 19:19-21; 20:1-6, 18-21.)

Dr. Levine prepared a second supplemental report after he had the opportunity to review Mr. Liebman's deposition testimony in addition to his vocational report. (Ex. HH, 6/18/15 Dr. Levine Supplemental Report.) Dr. Levine agreed with Mr. Liebman's conclusion that applicant was capable of returning to the open labor market.

In his report of October 14, 2014 and in his deposition testimony of October 21, 2014, Mr. Liebman was of the opinion that this patient would be capable of returning to the open labor market. I am in agreement with him noting the work restrictions that I cited above regarding this patient's capacity to participate in the open labor market. I do not consider this patient to be 100% permanently and totally disabled as noted in my prior reporting. There is nothing in the deposition testimony of Mr. Liebman that would cause me to change any of the opinions and conclusions that I have reached in my prior reporting.  
(Ex. HH, p. 4.)

## DISCUSSION

At trial, the parties stipulated that if the WCJ found Mr. Liebman's IVE report to constitute substantial evidence, applicant's permanent disability rating would be 47% after apportionment for the injury to her cervical spine, lumbar spine, psyche, and irritable bowel syndrome because of fibromyalgia.

In Finding of Fact number 5, the WCJ found Mr. Liebman's report "is substantial evidence."

Applicant now contends the WCJ's finding is not justified, arguing that Mr. Liebman's opinion failed to address the vocational effect of applicant's significant pain caused by her fibromyalgia syndrome. Applicant argues that Mr. Liebman's report's reliance upon the medical work restrictions improperly ignored the impact applicant's pain had on her ability to perform competitive work. Applicant asserts that Mr. Liebman's report should be excluded because it was based on "conjecture, speculation and assumption," because he assumed that Dr. Levine considered applicant's pain levels and medications when he assigned work limitations and restrictions.

Applicant cites *T&D Tile Co. v. Workers' Comp. Appeals Bd. (Teixeria)* (2002) 67 Cal.Comp.Cases 1231 [writ denied], for the proposition that a vocational analysis must consider the effect of pain. In *Teixeria*, the WCJ found the applicant to be permanently totally disabled based in part upon a vocational expert's uncontradicted opinion that the applicant's physical limitations and pain prevented his return to the open labor market. The WCJ rejected the defendant's claim that the WCJ had failed to consider relevant non-industrial factors.

From this, applicant argues that Mr. Liebman's reliance upon Dr. Levine's work restrictions failed to consider the effect her subjective pain had on her ability to return to work. However, in reviewing Dr. Levine's 2009 permanent and stationary report, and his 2015 supplemental report, we note that Dr. Levine did consider applicant's complaints of widespread



pain resulting from her industrial fibromyalgia. His permanent disability rating was predicated only on applicant's subjective complaints, as he concluded that her objective factors of disability would be considered on an orthopedic and psychiatric basis. He placed work restrictions and preclusions specifically to avoid the aggravation and exacerbation of her fibromyalgia symptoms. Mr. Liebman's report and deposition testimony considered Dr. Levine's work restrictions and preclusions as the limitations that applicant's fibromyalgia placed on her ability to work.

Applicant cites *Gottschalks v. Workers' Comp. Appeals Bd. (Widmer)* (2003) 68 Cal.Comp.Cases 1714 [writ denied], where a finding of permanent total disability was based on a vocational expert's opinion that applicant was unable to compete in the open labor market or participate in vocational rehabilitation, as the WCJ found the AME did not address vocational factors or the applicant's use of pain medications.

Here, Mr. Liebman relied upon the AME's work restrictions and preclusions designed to avoid the aggravation and exacerbation of her industrial fibromyalgia symptoms, and found applicant was not precluded from all gainful employment. Contrary to applicant's argument, as noted above, Dr. Levine did consider and comment on applicant's vocational feasibility, specifically designating work restrictions and preclusions necessary to accommodate her return to the workforce.

We note that despite applicant's contention that she should be considered permanently totally disabled, Dr. Levine, Dr. Feiwell and Dr. Gilberg all agreed that applicant is, as Dr. Gilberg stated: "occupationally feasible." (Ex. FF, p. 15.) All three AMEs reviewed Mr. Liebman's IVE report and did not find cause to challenge his review of their reporting or his findings.

Applicant further argues that Mr. Liebman did not consider Dr. Levine's finding that applicant's fibromyalgia was a subjective condition. This contention is not consistent with Mr. Liebman's review of Dr. Levine's reporting, as Mr. Leibman noted that Dr. Levine found applicant's fibromyalgia "manifested itself in this patient with widespread pain, nonrestorative sleep, chronic fatigue, symptoms of depression and anxiety, elements of cognitive dysfunction, headaches, a probable irritable bowel syndrome, and temporomandibular joint complaints." (Ex. AA, p. 4.) Mr. Liebman did consider that Dr. Levine's diagnosis of applicant's fibromyalgia presented through subjective factors of disability.

Applicant further contends that Mr. Liebman's report should be rejected because he did not perform "comprehensive testing." In our prior Decision After Reconsideration we returned this matter to the trial level because we found the record inadequate to support the WCJ's

determination. We indicated that the best way to resolve the issues was to reopen the record to refer “applicant to an agreed vocational expert to perform comprehensive testing to determine whether she may be able to participate in the open labor market.”

Mr. Liebman did not find it necessary to perform vocational testing in order to determine applicant’s vocational status. He concluded that he had sufficient information concerning applicant’s skills and experience and that vocational testing would not produce new data useful in the employability analysis.

Our referral for an independent vocational evaluation was not a directive to perform any specific testing, and the IVE’s determination as to the best methodology to follow to formulate an opinion was well within the scope of his expertise.

Finally, applicant argues that the WCJ erred in finding she did not sustain industrial injury to the additional body parts of internal system, jaw, buttocks, bilateral shoulders, arms, feet, sleep disorder, chronic pain, urinary, gastrointestinal and headaches. The WCJ stated that he found nothing in the AMEs’ medical reports to substantiate that applicant sustained injury to these additional parts of her body.

Applicant refers to Dr. Levine’s 2009 permanent and stationary report, wherein he diagnosed injury to multiple body parts. Dr. Levine indicated that applicant had multiple symptoms related to her fibromyalgia, noting widespread pain complaints. On page 27 of his report he discussed what industrially related injury applicant sustained as a result of her August 19, 2004 industrial injury.

I now return to the cover letter. I was asked whether the applicant has suffered from or sustained any industrially related injury as a result of the specific injury or continuous trauma. As noted above, I pointed out that this patient sustained orthopedic injuries on August 19, 2004 that ultimately evolved into fibromyalgia. There was no basis, in my opinion, for continuous trauma from September 1, 2003 to September 1, 2004. The patient did return to work for at least some period of time following the incident of August 19, 2004 until she left work on September 27, 2004. She did utilize the body parts injured on August 19, 2004 which represents some degree of continuous trauma but does not reflect continuous trauma in the course of her work from September 1, 2003 to September 1, 2004.  
(Ex. Y, p. 27.)

He identified several symptoms of applicant’s fibromyalgia, widespread pain, nonrestorative sleep, chronic fatigue, morning stiffness, and depression and anxiety. He identified

other “subjective factors of disability” as elements of cognitive dysfunction, symptoms compatible with a constipated irritable bowel syndrome, and temporomandibular joint complaints. I conclude that this patient's headaches are intermittent and slight. (*Ibid.*)

However, when providing whole person impairment ratings for applicant’s industrial fibromyalgia, Dr. Levine noted that there is no AMA Guides rating for fibromyalgia, and that any rating should have to be based on the major symptoms that interfere with applicant’s activities of daily living. For rating purposes, he identified applicant’s arousal and sleep disorder, her irritable bowel syndrome, and her pain. He also identified her emotional or behavioral disorder, which he deferred to Dr. Gilberg. The WCJ found that applicant’s fibromyalgia caused ratable irritable bowel syndrome, but he did not include the arousal and sleep disorder. As Dr. Levine found applicant sustained an industrial arousal and sleep disorder that caused ratable disability, applicant is entitled to a finding of injury for this condition. We will amend the Findings and Award to reflect this. As to the remaining body parts, there are no other medical reports that provide a justification for a finding of industrial causation.

Accordingly, we will affirm the WCJ’s award of 47% permanent disability for applicant’s August 19, 2004, based upon the substantial vocational expert opinion of Mr. Robert Liebman, but will amend the body parts injured to include applicant’s arousal and sleep disorder.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the November 10, 2016 Findings of Fact and Award is **AFFIRMED**, but that Findings of Fact number 1 and 2 are **AMENDED** as follows:

1. MAYRA APAC while employed on 08-19-2004 as a machine operator at Gardena, California, by DEUTSCH METAL COMPANY, whose workers' compensation insurance carrier was TRAVELERS DIAMOND BAR, sustained injury arising out of and occurring in the course of employment to her cervical spine, lumbar spine, psyche, and irritable bowel syndrome and arousal and sleep disorder because of fibromyalgia.
2. The applicant did not sustain injury to her internal system, jaw, buttocks, bilateral shoulders, arms, feet, chronic pain, urinary, gastrointestinal and headaches.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ DEIDRA E. LOWE, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 13, 2021**

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

**MAYRA APAC  
LAW OFFICE OF LAFAYETTE BLAIR  
CIPOLLA, CALABA, MARRONE & WOLLMAN**

***SV/pc***

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