WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARGARET NELLIGAN, *Applicant*

vs.

GROCERY ONE, INC. and SAMSUNG FIRE AND MARINE INSURANCE, administered by BROADSPIRE, INC., *Defendants*

Adjudication Numbers: ADJ9649059, ADJ9956563
San Luis Obispo 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.

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on February 5, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her right shoulder and bilateral elbows, and that orthopedic agreed medical examiner (AME) Daniel N. Ovadia, M.D., provided an appropriate *Almaraz-Guzman* analysis resulting in 28% permanent disability (ADJ9649059). The WCJ also found that applicant sustained injury AOE/COE to her left shoulder, resulting in 41% permanent disability, with no basis for apportionment (ADJ9956563).

Defendant contends that in case number ADJ9649059, Dr. Ovadia violated the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment, (AMA Guides) by combining applicant's right shoulder range of motion impairment with Manual Muscle Testing impairment; and that in case number ADJ9956563, Dr. Ovadia properly apportioned 25% of applicant's left shoulder disability to factors occurring before and/or after the industrial injury.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from applicant.

We have considered the allegations in the Petition, 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 her right shoulder while employed by defendant as a stock clerk during the period from May 1, 2010, through July 14, 2014 (ADJ9649059). Applicant also claimed injury to her left shoulder while employed by defendant as a stock clerk, on September 4, 2014 (ADJ9956563).

On March 6, 2018, AME Dr. Ovadia evaluated applicant regarding both injury claims. Dr. Ovadia examined applicant, took a history, and reviewed the medical record. The diagnosis for applicant's left shoulder was post subacromial decompression, and the right shoulder diagnosis was impingement syndrome with a full thickness rotator cuff tear. (Exh. 1, Dr. Ovadia, March 6, 2018, p. 12.) Dr. Ovadia concluded that based on limited range of motion, applicant had 4% whole person impairment (WPI) as to her right shoulder and that her left shoulder had not reached maximum medical improvement (MMI). (Exh. 1, p. 13.) As to the issue of apportionment, Dr. Ovadia stated:

> It is also my opinion that 75% of Ms. Nelligan's yet to be determined left shoulder residuals were caused as a direct result of the specific injury of September 4, 2014 arising out of and occurring in the course of employment, and 25% of this disability was caused by other factors occurring before and/or subsequent to said industrial injury (including prior industrial injuries): underlying glenohumeral arthritis.
> (Exh. 1, p. 14.)

Applicant underwent a left shoulder arthroplasty on May 7, 2018, and on January 4, 2019, Dr. Ovadia re-examined applicant. (Exh. 2, Dr. Ovadia, January 4, 2019, p. 2, interval history.) After re-examining applicant Dr. Ovadia found that applicant's left shoulder had not reached MMI status. (Exh. 2, p. 3.)

On August 30, 2019, Dr. Ovadia again re-examined applicant. In the report, he noted that he was only provided two reports from treating physician Dr. Schueckler, "… [O]therwise no new medical records [were] provided by the Parties for my review today" and "I would like to review the complete medical file since the time of my last evaluation (01/04/19)." (Exh. 3, Dr. Ovadia, August 30, 2019, pp. 1 and 2.) Dr. Ovadia later stated:

> Having reevaluated Ms. Nelligan today, I believe her shoulders reached maximal medical improvement when she was released by Dr. Schueckler (02/26/19).
> (Exh. 3, p. 4.)

Based on "the traditional application" of the AMA Guides Dr. Ovadia rated applicant's impairment. He initially stated that due to limited range of motion, applicant had 9% upper extremity impairment for her right shoulder. He assigned 17% upper extremity impairment for applicant's left shoulder and he included 24% left shoulder impairment as a result of the arthroplasty surgery. The combined left shoulder upper extremity impairment was 37% which converted to 22% WPI and Dr. Ovadia included a 1% pain add-on for a total of 23% WPI. (Exh. 3, p. 4.) He then stated:

> In my opinion, the above impairment rating does not adequately describe Ms. Nelligan's level of right shoulder impairment, and a modified impairment assessment is necessary pursuant to Almaraz/Guzman II. Utilizing the four corners of the AMA Guides, I believe Manual Muscle Testing can be combined with the above Range of Motion impairment rating to more accurately represent this lady's shoulder weakness and its effects on ADLs.
> (Exh. 3, p. 4.)

Utilizing the Manual Muscle Testing as a measure of applicant's impairment resulted in an 11% impairment which, when combined with the range of motion impairment, equaled 20% upper extremity impairment that converted to 12% WPI. Dr. Ovadia included a 2% pain add-on for a total of 14% WPI. (Exh. 3, pp. 4 - 5.) He then stated that, "Having reevaluated Ms. Nelligan today, I find no reason to change my prior (03/06/18) apportionment determination opinions." (Exh. 3, p. 5.)

The parties proceeded to trial on January 29, 2020. The issues submitted for decision included permanent disability and "Application of the *Almaraz-Guzman* principles of permanent disability." (F&A, p. 1.)

DISCUSSION

We first note that Dr. Ovadia's reference to "Almaraz/Guzman II" is in regard to the Appeals Board en banc decision which was affirmed by the Sixth District Court of Appeal, wherein the Court explained that the AMA Guides provide guidelines for the exercise of professional skill and judgment which, in a given case, may result in ratings that depart from those based on the strict application of the AMA Guides. (*Almaraz v. Environmental Recovery Services / Guzman v.*

Milpitas Unified School District (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman*) affirmed by *Milpitas Unified School Dist. v. Workers' Compensation Appeals Board* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (modified on other grounds on September 1, 2010).) Thus, defendant's argument that by combining impairment caused by loss of strength with decreased range of motion impairment, Dr. Ovadia "violated" the provisions of the AMA Guides is inconsistent with the Court's ruling affirming *Almaraz/Guzman*.[1]

To properly rate an injured worker's disability by applying an *Almaraz/Guzman* analysis, the doctor is expected to 1) provide a strict rating per the AMA Guides, 2) explain why the strict rating does not accurately reflect the applicant's disability, 3) provide an alternative rating using the four corners of the AMA Guides, and 4) explain why that alternative rating more accurately describes the applicant's level of disability. (*Milpitas Unified School Dist. v. Workers' Compensation Appeals Board, supra*, at 828-829.) Here, although Dr. Ovadia provided a strict rating of applicant's right shoulder and an alternative rating, he did not explain why the strict rating was not accurate nor why the alternative rating more accurately reflects applicant's level of disability. Absent an explanation as to the rating issues as noted, Dr. Ovadia's August 30, 2019 report (Exh. 3) does not constitute substantial evidence upon which a finding of disability can be based.

In order to constitute substantial evidence as to the issue of apportionment, the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*).) Here, in his initial report Dr. Ovadia apportioned 75% of applicant's "yet to be determined left shoulder residuals" to the September 4, 2014 specific injury, and 25% to her "underlying glenohumeral arthritis." (Exh. 1, p. 14.) Otherwise stated, Dr. Ovadia concluded that 75% of applicant's "yet to be determined" disability was caused by her injury and 25% was caused by non-industrial factors. The doctor did not explain how he was able to apportion applicant's permanent disability when the level of that disability had yet to be

[1] Defendant also argues that because Dr. Ovadia had previously rated applicant's right shoulder impairment, he could not re-examine applicant's right shoulder. This argument is without merit because it is inconsistent with the doctor's statement that applicant's, "… shoulders reached maximal medical improvement when she was released by Dr. Schueckler (02/26/19), and his determination that applicant's right shoulder symptoms/impairment had increased since his previous examination.

determined. He also did not explain how and why the "underlying glenohumeral arthritis" caused disability *at the time of the evaluation*, nor how and why the arthritis was responsible for 25% of applicant's disability. (*Escobedo v. Marshalls, supra.*) For these reasons, Dr. Ovadia's reports, and his opinions stated therein, are not substantial evidence as to the issue of apportionment.

As an AME, Dr. Ovadia was presumably chosen by the parties because of his expertise and neutrality. Therefore, his opinion should ordinarily be followed unless there is a good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) However, for the reasons discussed above, Dr. Ovadia's opinions do not constitute substantial evidence and a not a proper basis for determining the issues of permanent disability and apportionment.

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].) The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)

In our *en banc* decision, *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated, "Where the medical record requires further development either after trial or submission of the case for decision," the medical record should first be supplemented by physicians who have already reported in the case. "Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered." (*Id.*, at pp. 139, 142.) Based thereon, we recommend that the parties provide Dr. Ovadia the additional medical records, as appropriate, and request that he submit a supplemental report clarifying and explaining his opinions as to the issues discussed herein.

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

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on February 5, 2020, is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 13, 2021

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

LAW OFFICES OF JOHN SPATAFORE
MARGARET NELLIGAN
PARKER, KERN, NARD & WENZEL

TLH/*pc*

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