

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

ALICE FORD, *Applicant*

vs.

**NORTH COAST OPPORTUNITIES, INC.;
CYPRESS INSURANCE COMPANY, C/O BERKSHIRE
HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ13431760
San Francisco District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and 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 we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 14, 2022

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

**ALICE FORD
LAW OFFICES OF PETER M. GIMBEL
MULLEN & FILIPPI**

AS/abs

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 ON PETITION FOR RECONSIDERATION

INTRODUCTION

Defendants seek reconsideration of my August 26, 2022, Findings and Award (hereinafter “the F&A”). Therein, I awarded applicant 71 percent permanent partial disability (PPD) based, in part, on right shoulder impairment found by the Qualified Medical Evaluator (QME) pursuant to *Milpitas Unified School Dist. v. Workers’ Comp. Appeals Bd. (Guzman)* (2010) 187 Cal. App. 4th 808 (hereinafter “*Guzman*”). Petitioners contend that, in doing so, I acted in excess of the Appeals Board’s powers; that the evidence does not justify my findings; and that those findings do not justify the award. The petition is timely and verified. An answer has not yet been filed.

FACTS

1. Procedural background.

Applicant suffered an admitted industrial injury to multiple parts of body. The parties’ only dispute at trial related to the level of PPD based on the QME’s opinions. Defendants conceded the substantiality of the QME’s impairment findings relative to the three regions of the spine and the right knee, the latter rated by analogy under *Guzman*. They disputed the substantiality of the *Guzman*-based rating for the right shoulder, however. Based solely on this discrepancy, the parties stipulated that applicant’s final adjusted level of PPD is either 67 percent if the right shoulder is rated using a strict application of the *AMA Guides* or 71 percent if the *Guzman* rating is adopted.

2. Evidence at trial and decision.

As summarized on pages 2-6 of my August 26, 2022, Opinion on Decision (hereinafter “the Opinion”), the evidentiary record was appropriately limited, given the narrow issue being tried. No witnesses were called by either side and the only three exhibits consisted of the reports (joint exhibits 1 and 2) and deposition testimony (joint exhibit 3) of the QME, Manijeh Ryan, M.D.

Dr. Ryan did not find applicant’s disability permanent and stationary or issue impairment ratings at the time of the earlier evaluation in December 2020. In the next report, dated August 12, 2021 (exhibit 2), she arrived at 18 percent whole person impairment (WPI) for the cervical spine, another 18 percent WPI for the thoracic, and 25 percent WPI for the lumbar, all without deviating from the *AMA Guides*’ strict methodology. As to the right knee, she found no ratable impairment under the lower extremity chapter of the *Guides*, but cited *Guzman* and analogized to a hernia-based 5 percent WPI. As mentioned above, these ratings, including their adjustment for age and occupation, were not in dispute. Turning to the right shoulder, Dr. Ryan used the range-of-motion method in chapter 16 of the *AMA Guides* to arrive at 4 percent WPI. Her explanation for applying

Guzman, which yielded 10 percent WPI instead, is reproduced in the first block quotation on page 4 of the Opinion.

Dr. Ryan’s deposition was taken subsequent to the issuance of the reports in joint exhibits 1 and 2. The transcript was admitted only to the extent of excerpts designated by the parties and, on pages 5-6 of the Opinion, I set forth several key takeaways from the QME’s testimony.

Based on my analysis of this evidence, I concluded that Dr. Ryan’s *Guzman*-based right shoulder impairment opinion constitutes substantial medical evidence. Consequently, in accordance with the parties’ stipulation, I found that applicant has sustained 71 percent PPD and awarded her indemnity accordingly.

3. Contentions on reconsideration.

In their petition, defendants assert that the 10 percent WPI assigned by the QME for the right shoulder is not supported by substantial evidence, as a result of which I should have adopted the “strict” rating of 4 percent WPI instead and issued an award of 67 percent PPD.

DISCUSSION

1. The QME’s *Guzman*-based right shoulder rating constitutes substantial evidence.

Contrary to petitioners’ contention, Dr. Ryan gave a sufficiently probative explanation for deviating from a strict interpretation of the *AMA Guides* to arrive at 10 percent WPI for the right shoulder. As discussed on pages 6-7 of the Opinion, her report in exhibit 2 and the subsequent deposition testimony in exhibit 3 meet the criteria for a proper application of *Guzman* (see, e.g., *Minniefield v. State of California* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 347 at *6-7):

Here, Dr. Ryan did calculate a “strict” rating of 4 percent WPI for the right shoulder. She then indicated that applicant’s “very affected” activities of daily living necessitated a departure from the *Guides*—a notion she reinforced during her deposition, when she testified that a range-of-motion rating alone would not “cover” applicant’s impairment. She relied on figures sourced from Chapter 16 of the *AMA Guides* to arrive at the alternative rating (more on this below) and she opined that the resulting 10 percent WPI is an accurate representation of the actual disability, again citing in her deposition applicant’s difficulties with reaching overhead or washing her hair. Dr. Ryan’s reliance on the effect of applicant’s injury on her day-to-day activities such as personal hygiene is supported by what she documented about applicant’s self-reporting and I have no reason to doubt the veracity of applicant’s statements to the QME trouble bathing, gardening, and shopping for groceries and there are clear indications of such impairments becoming more severe between the two QME reports.

Turning to the question of Dr. Ryan’s adherence to the “four corners,” defendants argue that her resulting rating should not be followed because the *AMA Guides* instruct the evaluator not to combine strength and motion deficits. Similar arguments have been rejected by the Appeals Board in the past (see, e.g., *Fresno Unified School Dist. v. Workers' Comp. Appeals Bd.* (Barajas), 77 Cal. Comp. Cases 566, 570). The interpretation put forth by defendants is difficult to square with the principle behind *Guzman*—that an evaluator may turn to any section in the *AMA Guides* to assign an accurate impairment rating based on her professional training and expertise. If a QME had no discretion to deviate from the step-by-step framework of the *Guides*, there would be no such thing as a rating-by-analogy in most cases. This, in fact, is demonstrated by Dr. Ryan’s *Guzman*-based rating for the knee, which defendants concede is substantial evidence: the knee is not a hernia and does not have an abdominal wall, yet we recognize a QME’s ability to identify and apply such a rating where the “strict” WPI is inadequate. I see no significant difference between an evaluator looking to the hernia chapter to rate a knee, for example, and Dr. Ryan here rating both the strength diminution and loss of motion she documented in both reports.

Petitioners have not provided any legal support for their contention that the QME’s opinion is lacking because she failed to (1) “acknowledge that there are ... inherent inaccuracies in her strength rating” and (2) “objectively” measure the loss of strength in applicant’s shoulder instead of relying on estimates. In fact, in addition to documenting her expert manual muscle testing¹ findings on page 67 of her later report (5/5 strength in each category on the left, but only 4/5 in nine out of the 12 categories on the right), Dr. Ryan conducted a functional capacity evaluation, which is discussed on pages 51-56 of the same report. Moreover, the QME repeatedly characterized her *Guzman*-based impairment opinion as a more accurate measure of applicant’s true shoulder disability, citing real-world evidence in support (such as applicant’s reported difficulties with overhead lifting and other tasks). Although I found Dr. Ryan’s reporting to be less than optimal in terms of clarity, such shortcomings were not fatal to its probative value, when weighed against the substance of her analysis.

2. The cases cited by petitioners are inapposite.

As noted above, the Appeals Board has previously held, in cases such as *Barajas, supra*, 77 Cal. Comp. Cases 566, that an evaluator does not go beyond the four corners of the *AMA Guides* by rating loss of strength in the presence of diminished motion, notwithstanding language in the *Guides* to the contrary. Petitioners counter by citing two decisions, *Lopez v. Workers' Comp. Appeals Bd.* (2011) 76 Cal. Comp. Cases 180 and *Deans v. Palmdale Water Dist.* (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 16, as cases where a medical evaluator’s attempt to rate based on strength loss was rejected. However, neither *Lopez* nor *Deans* is on point. First, both involved medical reports issued before *Guzman* became law in August 2010. The panel decision in *Lopez*, reported *sub nom. Lopez v. Nth Degree Global* (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 424, was issued less than a month after the *Guzman* case was decided by the Court of Appeal and is based on medical reports issued in 2008 and 2009 (*id.* at *3). Similarly, the trial decision in *Deans* was

¹ See *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed., § 16.8a.

rendered about three months after *Guzman* was decided, but was based on QME reporting from 2009 (*Deans, supra*, 2011 Cal. Wrk. Comp. P.D. LEXIS 16 at *2).

Consequently, the issue in *Lopez* and *Deans* was not whether the respective evaluator complied with *Guzman*, but whether the *AMA Guides* methodology was carried out with sufficient accuracy and adherence to the text. Thus, in *Deans*, the Appeals Board observed, “it appears the PQME did not correctly measure applicant's grip strength or analyze her loss of grip strength.” *Id.* at *6. And, in *Lopez*, the QME’s decision to rate loss of strength under the *Guides* was rejected because he did not “indicate that the range of motion method he used to rate applicant's permanent disability did not adequately consider grip loss” (*Lopez, supra*, 2010 Cal. Wrk. Comp. P.D. LEXIS 424 at *7). Such factors are not present here: there is no evidence of improper testing methodology and Dr. Ryan did, in fact, explain that the loss of strength was not accounted for by the “strict” rating.

RECOMMENDATION

For the foregoing reasons, I recommend that defendants’ Petition for Reconsideration, filed herein on September 14, 2022, be denied.

DATED: September 21, 2022

Eugene Gogerman
Workers’ Compensation Judge
Workers' Compensation Appeals Board