WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RODOLFO MARTINEZ, ***Applicant***

vs.

IMPERIAL SPRINKLER SUPPLY, INC.; CALIFORNIA INSURANCE COMPANY adjusted by APPLIED RISK SERVICES, ***Defendants***

Adjudication Number: ADJ9900622
Anaheim 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 8, 2022

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

RODOLFO MARTINEZ
BENTLEY & MORE LLP
LAW OFFICES OF JOAN SHEPPARD

HAV/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Date of Injury:	February 25, 2015
Age on DOI:	55
Occupation:	Truck Driver
Parts of Body Injured:	Head, resulting in impairment to his brain, sleep, hear, sense of Smell, sensitivity to light (eyes), psyche, and headaches.
Identity of Petitioner:	Defendant, California Insurance Company/Applied Risk
Timeliness:	The petition was timely filed on May 17, 2022
Verification:	The petition was verified.
Date of Award:	May 10, 2022
Petitioner's Contentions:	Petitioner contends the WCJ erred by: 1) failing to justify an Increase in the permanent disability rating from 98% to 100% total permanent disability; 2) failing to evaluate the Applicability of *LeBouef vs. WCAB 34 Cal.3d 234, 1983*; 3) Failing to evaluate the applicability of *Athens Administrators vs. WCAB (Kite)* 78 C.C.C. 213, 2013; 4) failing to evaluate the applicability of Labor Code § 4662; and 5) failing to evaluate whether the medical reporting of Dr. David Patterson, Dr. Andrew Schreiber, and Dr. Joel Frank constituted substantial evidence.

II. FACTS

The parties stipulated that the applicant, Rodolfo Martinez, sustained injury to his head, resulting in impairment to his brain, sleep, hearing, sense of smell, sensitivity to light (eyes) psyche and headache on February 25, 2015.

The applicant was evaluated by multiple doctors in various specialties. He was also evaluated by vocational experts for both sides. The issue of his level of disability was ultimately tried and this judge issued her Findings and Award on May 10, 2022 finding that the applicant was 100% totally permanently disabled. Defendant's timely Petition for Reconsideration followed.

III. DISCUSSION

A. Failure to justify the increase in permanent disability from 98% to 100%. Petitioner asserts that it was error for this judge to justify the increase in the disability rating from 98% to 100% total permanent disability.

The parties submitted a total of 39 exhibits which included multiple medical reports, 4 Cross-examination transcripts, 10 vocational expert reports, and medical reporting from 6 different specialties. The Court reviewed each page of the evidence and outlined the multiple findings from the various doctors in describing the basis for the finding that the applicant was entitled to a finding of 100% total permanent disability.

In arriving at that conclusion, this judge rated each medical report personally and determined that, using only the AMA guides and the Combined Disabilities Chart, the applicant sustained a total of 98% disability.

Next reviewed were the multiple vocational reports submitted by both parties. While both experts were thorough in their testing and reporting, the Court found Mr. Michael Bonneau to be the more persuasive.

The finding by a vocational expert that an injured worker is not amenable to vocational rehabilitation and incapable of employment is sufficient to justify a finding of 100% permanent total disability. *Guzman vs. Milpitas Unified Scholl District*, (2009), 74 CCC470; Labor Code § 4660.1(g); Labor Code § 4662(b).

B. Failure to evaluate the applicability of LeBoeuf vs, WCAB (1983), 34 Cal.3d 234. Petitioner argues that it is impossible to apply the vocational opinion of Mr. Bonneau to the permanent disability as rated without considering *LeBoeuf*.

The California Supreme Court stated in *LeBoeuf*:

> A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability. 34 Cal.3d 234, 246.

As discussed above, the principles set forth in *LeBoeuf* were the basis for the finding in this case. The fact that the case itself was not cited in the Opinion on Decision does not preclude applying the principles for which it stands.

C. Failure to evaluate the applicability of Athens Administrators vs. WCAB (Kite), (2013), 78 CCC 213. Petitioner contends that the Court did not evaluate the applicability of Kite in arriving at its Findings. In fact, the Opinion on Decision clearly states that the permanent disability found in all the medical reporting "taken together" rated out to 98%.

However, it was not determined to be necessary to contemplate the rating method utilized in *Kite* because the combined rating of the medical reporting in addition to the vocational expert's opinion was sufficient to determine that the applicant was permanently and totally disabled.

D. *Failure to evaluate the applicability of Labor Code § 4662(a)(4)*. Petitioner argues that Labor Code 4662(a)(4) should have been utilized by the Court to determine that the applicant was presumptively totally disabled.

Labor Code § 4662(a)(4) provides that an injured worker will be presumptively determined to be totally permanently disabled in the event the injury to the brain resulted in permanent *mental incapacity*.

In the present case, Dr. Frank, the AME in Psychiatry determined that the applicant suffered from a major neuro cognitive disorder, but does not change his opinion that the applicant's disability results in whole person impairment of only 30%.

> *My AME Psychiatric MMI diagnosis and assessment opinions in Supplemental Report 2/15/19 are unchanged. The GAF 50 and WPI 30 included the psychiatric factors of cognitive impairment, reactive depression to neurological deficits and affective/judgment/insight/impulse control impairment. (Report of Dr. Joel Frank 10/05/20, page 27, exhibit R1)*

It was not the cognitive/psychiatric impairment alone that resulted in the 98% permanent disability found by the Court's rating. It was the cognitive/psychiatric impairment *combined* with the neurological, hearing, smell, sleep, headaches and dizziness that resulted in the final disability rating.

Accordingly, this judge did not find that Labor Code § 4662(a)(4) was applicable in this case.

E. *Failure to evaluate whether the medical reporting of Dr. David Patterson, Dr. Andrew Schreiber, and Dr. Joel Frank constituted substantial medical evidence*. Petitioner's final claim is that the medical reports of Dr. Patterson, Dr. Shreiber and Dr. Frank do not rise to the level of substantial evidence. However, Petitioner mis-states the issue raised by Defendant at the time of trial.

The specific issue, as stated in the Minutes of Hearing was whether the medical reporting of these three doctors was substantial medical evidence specifically "with respect to Labor Code Section 4662(a)(4) and the *Kite* and *LeBoeuf* cases."

No challenge was made to the overall admissibility of the reports, nor the fact that they constituted substantial evidence. In fact, the parties submitted them as joint exhibits.

Further, as stated above, neither Labor Code Section § 4662(a)(4), nor the *Kite* case were determined to be applicable in this matter. The principles for which the *LeBoeuf* case is generally cited were considered, but consideration of the reports of Dr. Patterson was not necessary in light of the reports and *deposition testimony* of Dr. Frank and Dr. Shreiber, which were considered to constitute substantial evidence, along with the reports of Dr. Markovitz, Dr. Berman, Dr. Sami and Dr. Tertzakian, as was so stated in the Opinion on Decision.

Petitioner does not directly challenge whether or not the reports constitute substantial evidence, only that the Court failed to evaluate whether they did or not. Neither is any reason given that the reports might not do so. The admissibility of the reports was not challenged at the time of trial, and as indicated above, the exhibits were submitted jointly.

IV.
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied in its entirety.

DATE: May 31, 2022

ALICE BURDEN
WORKERS' COMPENSATION JUDGE