WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WENDY COLLIE, *Applicant*

vs.

STATE OF CALIFORNIA, EMPLOYMENT DEVELOPMENT DEPARTMENT, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ2554534 (AHM 0124607)
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings, Award and Order (FA&O) issued by the workers' compensation administrative law judge (WCJ) on March 16, 2022.[1] By the FA&O, the WCJ found that applicant sustained an injury arising out of and in the course of employment (AOE/COE) to her lumbar spine, cervical spine, left shoulder, right hip, right knee, psyche, irritable bowel syndrome (IBS) and chronic pain syndrome. The WCJ further found that applicant was permanently totally disabled and there was no basis for apportionment to non-industrial factors.

Defendant contends that the WCJ improperly provided a medical assessment of whether applicant has chronic pain syndrome through application of the 6th Edition of the American Medical Association (AMA) Guides. Defendant further contends that the evidence does not support a finding that applicant has this condition. Defendant also asserts that the WCJ ignored her previous conclusion that applicant lacked credibility in finding that applicant has chronic pain syndrome and is permanently totally disabled. Lastly, defendant contends that the reporting of applicant's vocational expert is not substantial evidence and the WCJ improperly ignored the apportionment opinions of the medical experts.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny the Petition.

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[1] Commissioner Lowe was previously on the panel in this matter and is no longer a member of the Appeals Board. Another panelist has been assigned in her place.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny the Petition.

FACTUAL BACKGROUND

Applicant claims injury to the lumbar spine, cervical spine, left shoulder, right hip, right knee, psyche, IBS and chronic pain syndrome on March 15, 2002, while employed as an employment program representative by the Employment Development Department.[2] Defendant has accepted the claim, but disputes whether applicant has chronic pain syndrome. (Minutes of Hearing and Summary of Evidence, April 9, 2019, p. 3.)

Kenneth Grabow, M.D., a pain medicine physician, is applicant's primary treating physician (PTP) and has provided treatment for her orthopedic conditions since 2008. (Joint Exhibit WW, Dr. Grabow subpoenaed records, August 25, 2008, exh. pp. 602-606.) Applicant has undergone multiple treatment modalities for these conditions including back surgery, two right knee surgeries, injections, physical therapy, medications, acupuncture and a weight loss program. (Joint Exhibit Q, PR-2s by the PTP Dr. Grabow, October 4, 2018, exh. pp. 103-112.) In his December 15, 2017 report, Dr. Grabow opined in relevant part:

> The patient notes that she continues to experience aching, sharp, throbbing pain daily in her low back, neck, left shoulder and right hip and right knee. Her chronic pain causes depression, anxiety, fatigue, poor sleep, lack of motivation, and lack of confidence. She states she feels useless. She has irritability, frustration and guilt for not being a contributing member of society. She states she has frequent mood changes, lack of energy, is easily stressed and is forgetful. Her irritable bowel syndrome requires her to have constant access to restrooms. Chronic pain has limited her ability to exercise, which is caused over 30 pounds of weight gain. Her chronic pain symptoms have caused depression, anxiety and panic attacks. She is experiencing side effects from her medications which include nausea, drowsiness feeling mentally unclear, feeling mentally foggy with unclear thinking that caused lethargy and dry mouth.
>
> In summary, I believe the patient does have a chronic pain disorder that severely impact her quality of life and adversely affect her ability compete in the open labor market. I believe that the patient's injury of March 15, 2002 is the cause of for [*sic*] her pain and the symptoms she is experiencing.

[2] Applicant also filed two other claims against this employer, ADJ1207031 and ADJ2275696. This matter proceeded to trial solely regarding the March 15, 2002 injury (ADJ2554534). Applicant withdrew her petition to reopen ADJ1207031 and the parties stipulated to dismiss ADJ2275696, which was dismissed as part of the FA&O. (Minutes of Hearing and Summary of Evidence, April 9, 2019, p. 2; FA&O, March 16, 2022, p. 3.)

> I concur that Ms. Collie is not capable of returning to the open labor market as a result of her March 15, 2002 injury. She has significant orthopedic work restrictions as has been noted, the internal medicine, AME opined that the applicant lost 25% of her preinjury capacity to work and perform physical activities and restricted her to no undue emotional stress and unrestricted access to bathroom on an as needed basis or urgent basis. The psychiatric AME also noted work function impairments caused by her psychiatric and pain disorders.
>
> In summary, I believe that the patient's chronic pain issues combined with her orthopedic, internal medicine and psychiatric issues make her incapable of returning to the open labor market. I believe she is permanently and totally disabled.
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> (*Id.*, December 15, 2017, exh. p. 67.)

The parties utilized agreed medical evaluators (AMEs) in orthopedics, internal medicine and psychiatry. Larry Danzig, M.D. evaluated applicant as the orthopedic AME. Dr. Danzig provided several diagnoses of applicant's industrially related orthopedic conditions to the low back, neck, right hip, right knee and left shoulder. (Joint Exhibit Z, Ortho AME Dr. Danzig, October 31, 2017, p. 85.) He found her orthopedic conditions to have reached maximum medical improvement in his October 31, 2017 report. (*Id.* at p. 88.) Dr. Danzig provided the following whole person impairment (WPI) ratings: 8% for the cervical spine per DRE Category II, 26% for the lumbar spine per the ROM method (plus 2% add-on for pain), 5% for the left shoulder, 0% for the right hip and 3% for the right knee. (*Id.* at pp. 88-102.) Dr. Danzig found a basis for apportionment of permanent disability for the lumbar spine and cervical spine:

> In regard to Labor Code section 4663, based on my review of the available medical records and the history given to me by the patient, it is medically probable that approximately 90% of the patient's disability for the lumbar spine was caused as a direct result of the patient's injury of March 15, 2002.
>
> Based on my review of the available medical records and my physical examination of the patient, it is medically probable that approximately zero percent of the patient's disability for the lumbar spine was due to other factors, e.g. the patient's non-work related degenerative disc disease.
>
> Secondary to the patient's non-work related degenerative disc disease, the level of disability was greater than it would have been just due to the on-the-job injury alone.
> Secondary to the patient's non-work related degenerative disc disease, the patient's response to treatment was worse than it would have been just due to the on-the-job injury alone.
> …

> In regard to Labor Code section 4663, based on my review of the available medical records and my physical examination of the patient, it was medically probable that approximately ninety percent of the disability listed above for the patient's cervical spine was caused as a direct result of the patient's on-the-job injury of March 15, 2002.
>
> Based on my review of the available medical records and my physical examination of the patient, it was medically probable that approximately ten percent of the disability listed above for the patient's cervical spine was due to other factors, e.g. the patient's non-work related degenerative disc disease.
>
> Secondary to the patient's non-work related degenerative disc disease, the level of disability was greater than it would have been just due to the on-the-job injury alone.
>
> Secondary to the patient's non-work related degenerative disc disease, the patient's response to treatment was worse than it would have been just due to the on-the-job injury alone.
>
> (*Id.* at pp. 105-106.)[3]

Work restrictions were provided by Dr. Danzig for all orthopedic body parts except the right hip:

> In regard to the patient's cervical spine, the patient was prophylactically precluded from heavy lifting.
> …
> In regard to the patient's lumbar spine, the patient was prophylactically limited to light work.
> …
> In regard to the patient's left shoulder, the patient was prophylactically precluded from repetitive work at or above shoulder level with the left upper extremity.
> …
> In regard to the patient's right knee, the patient was prophylactically precluded from prolonged weightbearing, repetitive squatting and kneeling, and repetitive climbing.
>
> (*Id.* at pp. 102-104.)

Joel Frank, M.D. evaluated applicant as the psychiatric AME. He diagnosed applicant with a chronic pain disorder and depressive disorder. (Joint Exhibit U, Psychiatric AME Dr. Frank, June 21, 2018, p. 19.) Her psychiatric condition was considered predominantly caused by her

[3] It has been presumed by the parties and the WCJ that Dr. Danzig inadvertently stated "zero" instead of ten percent of the disability for the lumbar spine is related to other factors as he appears to attribute a portion of the disability to degenerative disc disease.

March 15, 2002 industrial injury. (*Id.* at pp. 27-28.) Dr. Frank concluded that her psychiatric condition became permanent and stationary as of May 29, 2012. (*Id.* at pp. 24-25.) He provided a GAF score of 57, which translates to 20% WPI. (*Id.* at p. 23.) With respect to apportionment, Dr. Frank stated:

> Based on the extensive apportionment discussion by AME orthopedic evaluator Dr. Danzig, M.D., his additional reports summarized in detail in the record review section of this report, it is reasonably medically probable with respect to psychiatric permanent disability/impairment, whole person impairment 20, 95% of this psychiatric whole person impairment is caused by specific injury March 15, 2002 at EDD. The psychiatric chronic pain disorder with its psychological component, the depressive disorder not otherwise specified with associated anxiety, is a compensable consequence of the orthopedic injury and its associated orthopedic disability, and based on AME orthopedic apportionment opinion, which I have summarized in the record review section of this report, it is reasonably medically probable 95% of psychiatric whole person impairment 20 is caused by specific injury March 15, 2002 and 5% is caused by factors other than injury arising out of and in the course of employment. The AME orthopedic opinion regarding orthopedic whole person impairment for each rated body part and apportionment thereof is summarized in detail in the record review section of this report, which indicates that most of the orthopedic permanent disability/impairment was apportioned to the specific injury, and there was a small amount of permanent disability/impairment apportioned to nonwork-causation factors such as degenerative changes. I have taken into account the orthopedic apportionment opinion and all of the other factors causing psychiatric permanent disability/impairment in reaching this opinion. Other than orthopedic permanent disability/impairment, based on available evidence, there is no other significant causal factor for psychiatric permanent disability/impairment.
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> (*Id.* at p. 27-28.)

Dr. Frank opined that "[p]sychiatric findings alone do not preclude applicant from performing usual and customary duties." (*Id.* at p. 25.)

Ernest Levister, Jr., M.D. evaluated applicant as the internal medicine AME. He diagnosed applicant with IBS, diarrhea type, which he considered the result of her 2002 injury. (Joint Exhibit S, Internal AME Dr. Levister, October 25, 2016, pp. 2-3.) This condition was considered permanent and stationary in his October 25, 2016 report. (*Id.* at p. 3.) Dr. Levister gave a 35% WPI rating for the condition using Table 6-4 of the AMA Guides. (*Id.*) No apportionment was given. (*Id.* at p. 4.) Dr. Levister commented as follows in relevant part:

> She has lost approximately 25% of her pre injury capacity to work or perform physical activities from an internal perspective. She has intermittent slight pain and should avoid undue emotionally stressful situations.
> …
> In view of the need to get to the bathroom quickly and/or soiling her underwear with stool, from the GI perspective she could probably function in a situation where she would have regular unrestrained access to the bathroom on an as needed or urgent basis.

(*Id.* at pp. 3-4.)

Applicant retained Enrique Vega as a vocational expert. Mr. Vega conducted testing on applicant and reviewed her medical records. (Applicant's Exhibit No. 1, Vocational report of Enrique Vega, July 31, 2018.) He opined in relevant part:

> In general, Ms. Collie has significant orthopedic, psychological and internal medicine impairments such that she could not realistically perform even basic job duties. Ms. Collie performed poorly during vocational testing. She has average academic functioning and borderline impaired intellectual functioning (this suggests the presence of cognitive impairment). Ms. Collie scored very low on a test of finger dexterity. Ms. Collie could not complete a test of manual dexterity or a test of hand-tool aptitude due to back and shoulder pain. She scored below average range (numbers) on a test of clerical aptitude and could not complete the second section of the test due headaches. She demonstrated low average knowledge of mechanical comprehension. Ms. Collie was observed to work very slowly. Ms. Collie's testing results suggest poor potential for retraining based on poor vocational aptitudes. Based on the evidence in this case, I find Ms. Collie to be unfeasible for vocational rehabilitation services.
> …
> As noted above, an analysis of transferable skills produced no reasonable occupational options. When opening the analysis to all occupations in the labor market, skilled and unskilled, there are also no results. Ms. Collie has poor residual functional capacities such that she does not have the ability to perform any occupations present in the competitive labor market. This is the case primarily due to orthopedic impairment, but it is also due to a combination of multiple impairments.
> …
> However, in this instance we have learned that Ms. Collie is not feasible for vocational rehabilitation services based the results of the vocational evaluation and the opinions of medical evaluators, which yielded poor prognosis for a return to work. She would not be seriously considered for employment given her poor residual functioning and poor vocational aptitudes.

(*Id.* at pp. 13-14, 18.)

The matter initially proceeded to trial on April 9, 2019. The issues identified at trial included injury AOE/COE for the chronic pain syndrome, permanent disability, apportionment and permanent total disability. (Minutes of Hearing and Summary of Evidence, April 9, 2019, pp. 3-4.) Applicant testified at trial in pertinent part:

> She has headaches, not everyday but 5 to 6 days per week. The duration is anywhere from 15 minutes to half a day. The headache symptoms are sensitivity to light, nausea, severe pain, pressure that builds and feels likes a vice, changes in vision. The headaches are randomly brought on and have no pattern. She takes Midrin once or twice a day. She feels the side effects of the Midrin are increased with nausea, drowsiness, and cloudiness where she is not clear minded.
>
> She has had two back surgeries, a fusion at L5 – S1 and disc replacement L4 - L5. Her back symptoms initially alleviated right after the surgery but then within a few weeks it became more intense and has continued to be worse. Her low back pain is present constantly. It radiates to both feet. It is worse when she lifts, bends, and sits or stands for prolonged periods of time, when she torques and twists. She has weakness in both legs. Her low back pain is moderate to severe when she is sitting, standing and sleeping. It is light to moderate when she is climbing stairs or lifting. It is moderate when she is riding driving, grooming and during sexual functions.
>
> Regarding her left shoulder, she has constant pain radiating down her arm. It increases when lifting or using it above shoulder level. She has difficulty dressing, doing household chores, writing and typing, and she has irritability.
>
> Regarding her right hip, she has pain 80 to 90 percent of the time. It is over the lateral aspect and radiates down to her left leg. It increases with prolonged sitting, standing, walking and climbing. She has moderate difficulty with the usual housework, hobbies, getting in and out of the car and going up and down stairs.
>
> Regarding her right knee, pain is present all the time. She has buckling, clicking, popping and swelling. She treats for her pain with Dr. Grabow. She has been seeing himself for 6 to 7 years. She believes the medicine he currently is prescribing for her is Ultram for pain. She takes it 4 times a week everyday. Gabapentin for pain twice per day and Lyrica for pain twice per day. The side effects of these medications include nausea, fogginess, lack of motivation, sleepiness, tired, lack of concentration, memory loss, irritability, anxiety and upset stomach.
>
> …
>
> She has issues with concentration, difficulty sleeping and wakes up fatigued. She has memory problems. For example, when cooking she cannot recall ingredients for recipes or whether or not she has already placed the item in the recipe.

…
She experiences gastrointestinal complications. These include diarrhea, nausea, sweating and vomiting. She can be anywhere doing anything and loses strength and becomes very hot, has to find a toilet, sometimes instantaneously has nausea and diarrhea, sweats profusely, and has to lie down either on the bathroom floor or if at home back to bed. She soils herself. She wears Depends three times per week. It restricts her activities. Going out is filled with anxiety and worry. She has a diaper in her purse right now. She takes a prescription called Lomotil every other day or as needed. She experiences the gastrointestinal problems even after taking the prescription. She has daily pain in all of the orthoepic [*sic*] body parts. The chronic pain creates depression, anxiety, fatigue, lack of confidence, irritability, frustration, frequent mood changes and memory loss. She believes her chronic pain syndrome is the reason for her anxiety and panic attacks.
…
The last time she worked was shortly before her surgery in 2010. She has not worked since because of her multiple symptoms. She was approved for Social Security Disability based upon her worker's compensation injuries/symptoms.
…
She has not worked since the complications of her 2010 back surgery. She was not able to sit or stand and has nerve problems in her legs. She retired from state service at some point. She does not recall the exact date.
…
She recalled seeing Dr. Joel Frank and going through her activities of daily living with him. She recalled saying that she had moderate difficulty sitting, grasping, lifting, riding and driving. Related to grasping, she can grasp with both hands, but it depends on the day. For example, today her left hand is weaker than her right, but it varies day by day.

Regarding lifting, she has a problem lifting heavy things, and lifting things from the ground or lifting things above her shoulder. She is able to ride and drive in a car but not for extended periods of time. For example, this morning it took her 20 minutes to drive to the Santa Ana Board and then 12 minutes from Santa Ana to Anaheim. On the way from her home to Santa Ana, she pulled off the freeway to use the restroom.
…
She does less daily household chores. She is able to do some. She is able to sweep, take laundry from the washer to the dryer as they are front loading machines. She puts groceries in the refrigerator. She has a housekeeper whom she calls as needed. There is no set time. She can do grocery shopping. She usually goes twice a week. She usually orders the items online using an app for Instacart and picks them up in the store. Sometimes she has them delivered. When she picks them up, she goes alone and with others.

(*Id.* at pp. 6-11.)

The second day of trial contains the following summary of testimony and events:

[Applicant] has difficulty reaching behind to dress herself such as clasping a bra or securing a necklace. She is able to drive but limited to distance. Last night she had a bad night with sweating and vomiting and did not go to sleep until 2:00 a.m. She almost did not appear today. She does not drive unless it is absolutely necessary, and she asks a lot of favors from friends. On an average week she drives 6 days out of the week for 10 minutes to take her kids to school, depending on the day.

She has difficulty cooking. Her husband works outside of the home and leaves 8:15 a.m., is home usually around 4:30, and sometimes he works from home. The number of days varies. She does not recall what his schedule was last week. She has two boys, ages 16 and 12. Everyone prepares their own breakfast. Usually the kids buy lunch at school. She and her husband make their own lunches. For dinners the kids each prepare a dinner one day per week. Her husband will sometimes make dinner. She will sometimes make dinner. It is usually a group effort. She makes dinner by herself once per week. They do not go out to eat very often. The last time was Mother's Day.

…

She drove herself to Court today in the Honda Accord. They do have a big truck, a Ford with 4 doors. They have a little truck, a Toyota. The kids have dirt bikes. Her husband has a quad and a motorcycle. She has a Vespa scooter. She does not drive it very often. She rode it the Saturday before Mother's Day. She does not recall when she drove it before that. Her husband rides next to her on his motorcycle. She usually rides her Vespa alone, sometimes with Joshua. At this time the Defendant requested to introduce sub rosa that was obtained Post MSC as impeachment evidence to applicant's testimony in regard to her ability to riding her scooter. Applicant's attorney objected as the video had not been served previously. The parties agreed to break for viewing of the sub rosa.

(Minutes of Hearing and Summary of Evidence, May 21, 2019, pp. 2-3, 6.)

The sub rosa videos were reviewed and are summarized as follows:

Video No. 1: Utilizing a video camera beginning at 8:52 a.m., the first sequence lasted about a minute, showing applicant getting on her scooter, taking it down to the bottom of a driveway, her son getting on the scooter and starting to drive away. The next section in Video No. 1 was at 9:03 a.m. in a parking lot, showing the applicant by herself backing out of a parking space, lasting less than one minute. The last part of the video at 10:13 a.m. shows the applicant parking her scooter at the bottom of her driveway, walking up to her house and putting her hair into a ponytail with both hands as she was walking.

Video No .2: Again, on 4/6/19, is a dash cam video beginning at 8:53 a.m. which shows the applicant driving her scooter with her son on the back through various streets, then parking in a parking lot, leaving alone and driving along several streets again. The video ends at approximately 9:08 a.m.

> Video No. 3: This video was taken on a cell phone inside of a building and then walking outside of the building, beginning at 8:59 a.m. The video shows the applicant carrying something in her left hand and walking unassisted out to the parking lot, lasting approximately three minutes, ending at 9:02 a.m.
>
> (*Id.* at p. 7.)

The matter was to stand submitted following briefing by both parties. (*Id.* at p. 2.)

On July 19, 2019, the WCJ issued an Order Vacating Submission and Order Developing the Record. The WCJ noted in the Order that she "found the subrosa evidence to be persuasive impeachment evidence of the applicant's testimony regarding her abilities and activities of daily living." The WCJ ordered the Order Vacating Submission and Order Developing the Record and sub rosa videos be provided to the PTP, AMEs and applicant's vocational expert for comment.

Applicant sought removal of the July 19, 2019 Order Vacating Submission and Order Developing the Record. In her Petition, applicant argued that the WCJ's comment regarding the sub rosa videos should be stricken from the Order before sending it to the experts. In response to applicant's Petition, the WCJ issued an "Order Rescinding the Order Vacating Submission dated July 19, 2019, Amended Order Vacating Submission, and Amended Order Developing the Record" on August 1, 2019. It was again ordered that further reporting from the PTP, AMEs and applicant's vocational expert was necessary.

Additional reporting was obtained pursuant to the WCJ's August 1, 2019 Order. The internal medicine AME Dr. Levister opined in relevant part:

> The need to restrict activities is a criterion for putting a patient into Class 3. The defense attorney is correct the gastrointestinal rating was based on subjective data. She does not meet the criteria for Class 3. There is therefore a basis to modify her disability rating. I would move her to a Class 2 with a 10 to 24% range of whole person impairment. Based on the currently available information I would rate her at 20% whole person permanent impairment.
>
> (Joint Exhibit QQ, Report of Dr. Levister, September 1, 2019, p. 5.)

Review of the sub rosa videos and applicant's trial testimony did not alter the opinions of the PTP Dr. Grabow, the psychiatric AME Dr. Frank or the orthopedic AME Dr. Danzig. (Joint Exhibit RR, Report of Dr. Grabow, October 31, 2019; Joint Exhibit SS, Report of Dr. Frank, March 4, 2020; Joint Exhibit UU, Report of Dr. Danzig, August 9, 2019.) Applicant's vocational expert, Mr. Vega, also did not change his opinions. (Joint Exhibit VV, Report of vocational rehab expert of Mr. Vega, October 1, 2019, pp. 6-7.)

The matter proceeded to trial again on June 15, 2020, at which time the additional reporting was admitted into evidence and the matter was resubmitted. (Minutes of Hearing, June 15, 2020.) On August 13, 2020, the WCJ issued another Order Vacating Submission and Order Developing the Record. The WCJ found that the record did not constitute substantial evidence and ordered the parties to develop the record. The WCJ specifically requested development of the record regarding applicant's headache complaints by either stipulation to an AME in neurology or the WCJ would appoint a regular physician.

Defendant sought removal of the August 13, 2020 Order Vacating Submission and Order Developing the Record. We denied defendant's Petition for Removal in our October 28, 2020 Opinion and Order Denying Petition for Removal.

On February 4, 2021, the WCJ issued her Order Appointing Regular Physician in Neurology ordering the parties to proceed with an evaluation with Dr. Kenneth Nudleman.

Dr. Nudleman evaluated applicant on March 9, 2021. (Joint Exhibit ZZ, Dr. Nudleman report, March 9, 2021.) Dr. Nudleman opined that applicant's headaches, migraines and sleep disorder are industrially caused. (Joint Exhibit QQQ, Dr. Nudleman report, April 7, 2021, p. 8.) He assigned the headaches a 9% WPI rating. (Joint Exhibit TTT, Dr. Nudleman report, June 8, 2021, p. 2.) Dr. Nudleman apportioned permanent disability for the headaches "40% to the March 15, 2002 specific injury and cumulatively 60% based on the mutifactorial issues of stress, poor sleep, pain and an underlying anxiety." (*Id.*) He opined that applicant "had to work in an environment, in my opinion, that there was no perceived undue stress." (*Id.*) Dr. Nudleman subsequently clarified in his deposition testimony that the permanent disability for the headaches is 100% attributable to applicant's 2002 industrial injury. (Joint Exhibit UUU, Dr. Nudleman deposition transcript, August 25, 2021, pp. 11-13.)

Additional exhibits including Dr. Nudleman's reporting and deposition transcript were admitted into the record on December 5, 2021. (Minutes of Hearing, December 5, 2021, p. 2.) The matter was then resubmitted. (*Id.* at p. 1.)

The WCJ requested a formal rating from the DEU. Applicant's injury was rated at 71% permanent disability by the DEU. The WCJ issued the resulting FA&O as outlined above. In the Opinion on Decision, the WCJ evaluated applicant's chronic pain syndrome by applying the criteria for this condition outlined in the 6th Edition of the AMA Guides. (Opinion on Decision, March 16, 2022, pp. 2-4.) The WCJ concluded:

> The Court believes the applicant is suffering from the effects of her industrial injuries and has chronic pain syndrome. It is unfortunate that the applicant's testimony lacked some credibility. For example, she was seen on the subrosa video walking while using both hands to place her hair into a ponytail. This action seems to be inconsistent with her statements regarding stability and balance. The Court understands that every day is not the same and the applicant testified that some days are better than others. Even in light of the slight credibility issue, the Court finds the applicant suffers from a chronic pain syndrome that is directly caused by her industrial injuries.

(*Id.* at p. 4.)

DISCUSSION

I.

Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.)[4] However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Defendant's Petition was timely filed on April 8, 2022. Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

II.

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb*

[4] All further statutory references are to the Labor Code unless otherwise stated.

v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . 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." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Defendant contends that the WCJ improperly applied the 6th Edition of the AMA Guides to find that applicant has chronic pain syndrome. It is acknowledged that applicant's permanent impairment must be determined by use of the 5th Edition of the AMA Guides. (See Lab. Code, § 4660(b)(1).)[5] However, there is substantial medical evidence in the record to support the finding that applicant has chronic pain syndrome on an industrial basis. Applicant's PTP for several years, Dr. Grabow, outlined her pain symptoms and their impact on her in his December 15, 2017 report. (Joint Exhibit Q, PR-2s by the PTP Dr. Grabow, December 15, 2017, exh. p. 67.) He explained that she has chronic pain syndrome as a result of her 2002 injury. (*Id.*) This diagnosis was also endorsed by the psychiatric AME Dr. Frank. (Joint Exhibit U, Psychiatric AME Dr. Frank, June 21, 2018, pp. 19, 27-28.) The parties presumably choose an AME because of the AME's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) We will follow the opinions of the AME unless good cause exists to find their opinion unpersuasive. (*Id.*)

Defendant makes much of the lack of a diagnosis for chronic pain syndrome by the orthopedic AME Dr. Danzig and Dr. Danzig's pain add-on for the lumbar spine. Dr. Danzig did not comment in his reporting on whether applicant has this condition. A lack of this diagnosis by Dr. Danzig does not preclude a finding that applicant has chronic pain syndrome.

Defendant further contends that the WCJ ignored her prior conclusion that applicant is not credible after review of the sub rosa videos. We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses.

[5] Applicant's injury occurred in 2002 and may be subject to the 1997 Permanent Disability Rating Schedule (PDRS). (See Lab. Code, § 4660(d); see also *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (*Chavez*) (2007) 151 Cal.App.4th 148, 152 [72 Cal.Comp.Cases 582] ["when any of these three circumstances [in section 4660(d)] have occurred before January 1, 2005, the percentage of permanent disability will be calculated using the earlier schedule that was in effect on the date of the injury"].) However, the parties do not appear to dispute that applicant's injury must be rated using the 2005 PDRS and the record supports that the 2005 PDRS applies.

(*Garza, supra,* 3 Cal.3d at pp. 318-319.) The WCJ acknowledged in her Opinion on Decision that applicant's "testimony lacked some credibility." (Opinion on Decision, March 16, 2022, p. 4.) However, the WCJ also recognized that applicant confirmed that some days are better than others. (*Id.*) She still maintained her conclusion that applicant suffers from a chronic pain syndrome despite her "slight credibility issue."

There is substantial evidence in the record to support the WCJ's finding that applicant has chronic pain syndrome as a result of her 2002 injury.

III.

Employers are responsible to injured workers for permanent disability resulting from an industrial injury. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1269 [76 Cal.Comp.Cases 624].) "A permanent disability is the irreversible residual of a work-related injury that causes impairment in earning capacity, impairment in the normal use of a member or a handicap in the open labor market." (*Id.* at p. 1270, citing *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320.) The employee bears the burden of proving the approximate percentage of permanent disability directly caused by the industrial injury by a preponderance of the evidence. (*Escobedo, supra,* 70 Cal.Comp.Cases at p. 612; Lab. Code, §§ 3202.5, 5705.)

Applicant's injury occurred before January 1, 2013 and therefore her permanent disability must be determined pursuant to section 4660. (Lab. Code, § 4660.) The scheduled rating of permanent disability pursuant to the 2005 PDRS and section 4660(a) is comprised of the following components: 1) the nature of the physical injury or disfigurement, 2) the employee's occupation, 3) the employee's age, and 4) the employee's diminished future earning capacity. Applicant's scheduled permanent disability for the various body parts is 71%. While the scheduled rating is prima facie evidence of an employee's level of permanent disability resulting from an injury, case law has held that the scheduled rating, including its component parts, may be rebutted. (Lab. Code, § 4660(c); see *Ogilvie, supra,* 197 Cal.App.4th at p. 1277 [outlining three methods of rebutting the scheduled rating]; *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Almaraz/Guzman III*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] [the employee's WPI may be rebutted where the physician provides a WPI rating using a different chapter, table, or method of assessing impairment of the AMA Guides that more accurately reflects the injured employee's impairment based on the physician's judgment, training and experience]; *Costa v. Hardy Diagnostic* (2006) 71 Cal.Comp.Cases 1797, 1817-1819 (Appeals Board en banc) [scheduled rating under the 2005

PDRS may be rebutted]; *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680].)

In *Ogilvie*, the Court outlined three methods to rebut the scheduled rating: 1) the showing of a factual error in the calculation of a factor in the rating formula or application of the formula; 2) the omission of medical complications aggravating the employee's disability in preparation of the rating schedule; or 3) by demonstrating that due to the industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1277.)

Section 4662(b) states that in all cases where permanent disability is not presumed total, "permanent total disability shall be determined in accordance with the fact." (Lab. Code, § 4662(b).) The Court of Appeal in *Fitzpatrick* analyzed how an employee may show permanent total disability "in accordance with the fact" under section 4662(b). The Court held that "Section 4660 is *mandatory*" and "addresses *how* the determination on the facts shall be made in each case for injuries occurring before January 1, 2013." (*Fitzpatrick*, *supra*, 27 Cal.App.5th at pp. 622, 618, emphasis in original.) As discussed above, a permanent disability rating derived from application of section 4660 is rebuttable though and therefore, an employee may "present evidence supporting a 100 percent disability rating when the scheduled rating is less." (*Id.* at p. 620.)

A determination that an injured worker "cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete [in the open labor market]. Accordingly, that factor should be considered in any determination of a permanent disability rating." (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587].) "The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the employee from taking advantage of vocational rehabilitation and participating in the labor force." (*Contra Costa County vs. Workers' Comp. Appeals Bd.* (*Dahl*) (2016) 240 Cal.App.4th 746, 758 [80 Cal.Comp.Cases 1119].) This necessitates an "individualized approach," which looks at the impact of only the industrial injury without consideration for nonindustrial factors on the employee's amenability to vocational rehabilitation. (*Id.*)

Applicant's PTP Dr. Grabow has provided treatment to her for several years and is presumably most familiar with the impact of her injury. He concluded that she is unable to compete in the open labor market in his December 15, 2017 report:

> I concur that Ms. Collie is not capable of returning to the open labor market as a result of her March 15, 2002 injury. She has significant orthopedic work

> restrictions as has been noted, the internal medicine, AME opined that the applicant lost 25% of her preinjury capacity to work and perform physical activities and restricted her to no undue emotional stress and unrestricted access to bathroom on an as needed basis or urgent basis. The psychiatric AME also noted work function impairments caused by her psychiatric and pain disorders.
>
> In summary, I believe that the patient's chronic pain issues combined with her orthopedic, internal medicine and psychiatric issues make her incapable of returning to the open labor market. I believe she is permanently and totally disabled.
>
> (Joint Exhibit Q, PR-2s by the PTP Dr. Grabow, December 15, 2017, exh. p. 67.)

Applicant has work restrictions for a myriad of body parts. The orthopedic AME Dr. Danzig provided applicant with several restrictions for the orthopedic parts including: precluded from heavy lifting for the cervical spine; limited to light work for the lumbar spine; precluded from repetitive work at or above shoulder level with the left upper extremity for the left shoulder; and precluded from prolonged weightbearing, repetitive squatting and kneeling, and repetitive climbing for the right knee. (Joint Exhibit Z, Ortho AME Dr. Danzig, October 31, 2017, pp. 102-104.) The internal medicine AME Dr. Levister concluded that applicant "should avoid undue emotionally stressful situations" and "she could probably function in a situation where she would have regular unrestrained access to the bathroom on an as needed or urgent basis." (Joint Exhibit S, Internal AME Dr. Levister, October 25, 2016, pp. 3-4.) The neurologist Dr. Nudleman similarly stated that applicant "had to work in an environment, in my opinion, that there was no perceived undue stress." (Joint Exhibit TTT, Dr. Nudleman report, June 8, 2021, p. 2.)

The vocational expert, Mr. Vega, conducted an evaluation of applicant's vocational feasibility including testing and a comprehensive review of the limitations reflected in the medical reporting. He reported that applicant struggled to complete the testing. Mr. Vega analyzed potential skilled and unskilled occupations to determine whether applicant is able to compete in the labor market. He ultimately concluded that applicant "has poor residual functional capacities such that she does not have the ability to perform any occupations present in the competitive labor market. This is the case primarily due to orthopedic impairment, but it is also due to a combination of multiple impairments." (Applicant's Exhibit No. 1, Vocational report of Enrique Vega, July 31, 2018, p. 14.)

Applicant's trial testimony further revealed difficulty dressing, household chores, lifting, concentration, sleeping, writing and typing. She wears Depends three times a week and sometimes soils herself before she can get to the toilet.

There is substantial evidence in the record showing that applicant is not amenable to vocational rehabilitation and is unable to compete in the open labor market as a result of her industrial injury. We therefore agree with the WCJ's finding that applicant has successfully rebutted the scheduled rating and is permanently totally disabled.

IV.

Lastly, defendant contends that the WCJ improperly disregarded the apportionment provided by the AMEs for the cervical spine, lumbar spine and psyche. While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, the employer holds the burden of proof to show apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo, supra*, 70 Cal.Comp.Cases at p. 613, *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) To meet this burden, the employer "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo, supra*, 70 Cal.Comp.Cases at p. 620.)

"Apportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Determining apportionment requires looking "at the current disability and parcel[ing] out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source." (*Brodie, supra*, 40 Cal.4th at p. 1328.) Physicians are required to address apportionment when evaluating permanent impairment. (Lab. Code, § 4663(b)-(c).)

"Apportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay, supra*, 96 Cal.App.3d at p. 564.) Thus, the WCJ has the authority to determine the appropriate amount of apportionment, if any. As discussed above, decisions by the Appeals Board must be supported by substantial evidence. Therefore, the WCJ must determine if the medical opinions regarding apportionment constitute substantial evidence. (See *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

As outlined in *Escobedo*:

> [I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles.
>
> (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 621, citations omitted.)

The Court of Appeal has similarly held in relevant part:

> It is certain the mere fact that a report addresses the issue of causation of the permanent disability, and makes an apportionment determination by finding the approximate relative percentages of industrial and nonindustrial causation does not necessarily render the report one upon which the Board may rely.
>
> (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].)

The orthopedic AME Dr. Danzig apportioned 10% of the permanent disability for the cervical spine and lumbar spine to degenerative disc disease. Dr. Danzig opined for both parts of the spine that "the level of disability was greater than it would have been just due to the on-the-job injury alone" and her "response to treatment was worse than it would have been." (Joint Exhibit Z, Ortho AME Dr. Danzig, October 31, 2017, pp. 105-106.) In discussing an example in *Escobedo*, we expressly stated that "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*, *supra*, 70 Cal.Comp.Cases at p. 621.) Dr. Danzig does not explain the nature of applicant's degenerative disc disease or how and why it causes part of applicant's permanent disability for the cervical and lumbar spine. His summary conclusions that this non-industrial condition increased applicant's level of disability and worsened her response to treatment are insufficient to support a finding of apportionment for the permanent disability attributed to these parts.

The psychiatric AME Dr. Frank opined that "based on AME orthopedic apportionment opinion, which I have summarized in the record review section of this report, it is reasonably medically probable 95% of psychiatric whole person impairment 20 [*sic*] is caused by specific injury March 15, 2002 and 5% is caused by factors other than injury arising out of and in the course of employment." (Joint Exhibit U, Psychiatric AME Dr. Frank, June 21, 2018, p. 28.) Dr. Frank does not explain what other "factors" are responsible for 5% of the psychiatric permanent

disability. He also appears to base his apportionment opinion partially on the apportionment opinion of Dr. Danzig for the orthopedic parts.

It is the responsibility of each medical evaluator to determine apportionment for the body parts or body systems within his or her area of expertise. Doctors may not simply mirror the apportionment opinions of other doctors in a case without providing independent justification for their opinion. To the extent that Dr. Frank attempted to mirror his apportionment opinion for the psychiatric condition to Dr. Danzig's apportionment for the orthopedic parts to degenerative disc disease, this was improper. Additionally, if Dr. Frank believed that he *must* provide apportionment to other factors for the psyche because there was apportionment for the spine, his opinion is based on an incorrect legal theory. (See *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93] [medical opinions are not substantial evidence if they are based on incorrect legal theories].)

Therefore, we agree with the WCJ that the record does not support a basis for apportionment of disability to the cervical spine, lumbar spine or psyche.

In conclusion, we will deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Award and Order issued by the WCJ on March 16, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2023

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

STATE COMPENSATION INSURANCE FUND
STRAUSSNER & SHERMAN
WENDY COLLIE

AI/*pc*

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