WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VILMA ANGELES, *Applicant*

vs.

ALAMEDA HEALTHCARE & WELLNESS CENTER; ULLICO CASUALTY COMPANY, in liquidation; administered by INTERCARE INSURANCE, *Defendants*

Adjudication Number: ADJ7915626
Oakland 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 Vilma Angeles filed a Petition for Reconsideration from the Findings and Award, issued October 8, 2020, wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained 74% permanent disability as a result of an admitted cumulative trauma injury during the period October 22, 1988 through May 1, 2020[1], to her neck, upper extremities, nervous system, and other body systems, while employed as a medical records supervisor by Alameda Healthcare & Wellness Center. The WCJ awarded applicant permanent disability indemnity in the total sum of $114,118.88, leaving informal adjustment of the rate of payment of weekly benefits to the parties, with jurisdiction reserved.

Applicant contests the WCJ's award of 74% permanent disability and the amount of permanent disability indemnity awarded. Applicant contends that she is permanently totally disabled and has rebutted the rating derived from the permanent disability rating schedule, asserting that substantial medical and vocational evidence establishes that her inability to compete in the open labor market is due solely to the effects of her cumulative trauma injury to her neck and upper extremities. Applicant further asserts that the WCJ's monetary award for 74%

[1] The last date of injurious exposure was May 1, 2010.

permanent disability is incorrect, and that the WCJ made other errors citing to the vocational evidence of Mr. Malmuth.

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, as our Decision After Reconsideration, we will amend the Findings and Award to find applicant is 100% permanently disabled.

FACTS

Applicant sustained an admitted cumulative trauma injury over the period October 22, 1988 through May 1, 2010, while employed as a Medical Records Supervisor by Alameda Healthcare & Wellness Center. She sustained injury to her bilateral upper extremities in the form of carpal tunnel syndrome, to her bilateral shoulders, cervical spine, and to her psyche.

Medical evaluations were performed by Dr. David Suchard, as an Agreed Medical Examiner (AME), Dr. James Shaw, a pain specialist as Qualified Medical Evaluator (QME), Dr. Stephen Heckman, as QME in psychology, and Rachel Feinberg, DPT, who performed a Functional Capacity Evaluation (FCE). Vocational evaluations were performed by Jeff Malmuth for applicant and Howard Stauber for defendant.

Dr. Suchard reported on August 24, 2016, that applicant complained of the gradual onset of pain in her neck, left shoulder and upper extremities, with paresthesias in her hands and wrists. (Ex. 1. 8/24/16 Dr. Suchard AME Report, p. 2.) She was initially assessed with carpal tunnel syndrome on the left, and had surgical repair in December of 2010. She had previously had carpal tunnel release on her right wrist in 2005. She also was found to have a small partial thickness rotator cuff tear in her left shoulder. She returned to work in March of 2011, following her carpal tunnel surgery, and continued to work until May of 2013. He determined that applicant did not have an additional injury from cumulative trauma during the period after she returned to work through her last day of work in 2013. (Ex. 2. 9/13/17 Dr. Suchard AME Supplemental Report, p. 2.)

> It is my opinion that Ms. Angeles sustained one period of cumulative trauma injury (through 12/02/2010), resulting/contributing to her current work injury-

> related conditions including neck pain, left shoulder impingement, bilateral lateral epicondylitis, and carpal tunnel syndrome, to a reasonable degree of medical probability.
> (Ex. 1. 8/24/16 AME Report, p. 10.)

Dr. Suchard deferred the determination of applicant's impairment to Dr. Shaw, the QME for the claim for the initial period of cumulative trauma through May of 2010, as Dr. Suchard was chosen to evaluate a separate claim of cumulative trauma injury through May 15, 2013.

Rachel Feinberg, DPT, conducted a Functional Capacity Evaluation (FCE) on January 18, 2016. She noted that applicant's report of her physical abilities placed her "in the below sedentary work category." (Ex. 101. Dr. Feinberg, 1/18/16 FCE, p. 15.) Dr. Feinberg described applicant's functional capacity as follows:

> Based on the outcome of the functional capacity testing, Ms. Angeles has the capacity to lift 15 lbs. from waist to shoulder level and 25 lbs. from waist to floor level. She has the capacity to carry 15 lbs. on an occasional basis. In some of the heavier material handling tasks, Ms. Angeles stopped testing due to her fear. She was showing signs that the weight was heavy for her, but did not appear to have reached her musculoskeletal limit. The weights listed above and in the chart below document the level she appears capable of performing at. She can sit on a constant basis, up to 6 hours with breaks. She has the capacity to stand and walk on a frequent basis. Her sitting and standing tolerance is limited by her reports of low back and knee pain. Her walking tolerance is limited by her decreased endurance. She was able to push/pull 25 lbs. on an occasional basis. She can perform static neck posturing on an occasional basis and repetitive neck movement on an infrequent basis. She can perform gripping/grasping tasks on an occasional basis and fine motor manipulation tasks on a frequent basis up to 3 hours, although reported pain with hand tasks. She had difficulty with kneeling and climbing due to reports of bilateral knee pain. Although she had functional range of motion, she avoided neck movements with functional tasks, especially overhead reaching.
> (Ex. 101. Dr. Feinberg, 1/18/16 FCE, p. 2.)

Among her findings, Dr. Feinberg concluded applicant required a 10 minute break for every 30 minutes of standing, up to 66% of the day, and a 10 minute break for every 30 minutes of sitting, up to 6 hours per day. She was precluded from repetitive use of her left arm, and from forceful use of both arms. (Ex. 101, Dr. Feinberg, 1/18/16 FCE, p. 3.) The Neck Disability Index, which determined applicant's perceived neck disability, was calculated in the "crippled" range at 74%, "60-80% Crippled: Neck pain impinges on all aspects of these patient's lives both at home and at work and positive intervention is required." (Ex. 101, p. 17.) A measure of upper extremity

disability on a scale of 0-100 was calculated at 79.2, which "suggests she is unable to work because of her upper limb pain." (Ex. 101, p. 18.)

Dr. Shaw's reports of his initial examinations were not offered into the record. A supplemental report dated November 1, 2017, defendant's Exhibit C, is the first of three reports submitted. He did not detail his discussion and findings regarding applicant's history and condition, as he noted: "The patient's history of injury, present complaints, and occupational history, past medical history, medical record review, physical examination, and physical findings are as previously noted." (Ex. C. 11/1/17 Dr. Shaw QME Supplemental Report, p. 6.) He also referred to prior reports for applicant's medical issues that pre-dated her industrial injury.

According to Mr. Malmuth's January 29, 2018 vocational report (Ex. 4. 1/29/18 Malmuth Vocational Evaluation, p. 55), Dr. Shaw testified at deposition that he reviewed Dr. Feinberg's FCE and found it was an accurate description of applicant's functional limitations.[2] Mr. Malmuth also reviewed Dr. Shaw's March 24, 2016 supplemental report, where Dr. Shaw indicated that applicant's permanent functional work restrictions are described in Dr. Feinberg's FCE report, and his review of the FCE did not cause him to change his whole person impairment rating. (Ex. 4. 1/29/18 Malmuth Voc. Eval., p. 60.)

Dr. Shaw provided an apportionment determination, stating in full:

> Pursuant to Labor Code §4663, after considering the entirety of the medical evidence in this case, it is my opinion, to a degree of reasonable medical probability, that 10% of the permanent disability/whole person impairment in this case is due to pre-existing non-industrial medical conditions, as well as non-industrial activities of daily living, and non-industrial recreational activities. (Ex. C. 11/1/17 Dr. Shaw QME Supplemental Report, p. 7.)

In his next report, Dr. Shaw re-reviewed Dr. Suchard's August 24, 2016 report and reviewed his September 13, 2017 report, with no substantive discussion. In the final supplemental report defendant offered into evidence, Dr. Shaw provided a graph summary of his impairment ratings for each body part and apportionment, again with no substantive discussion explaining his findings.

Dr. Shaw's October 5, 2017 deposition testimony was largely concerned with whether she sustained an additional cumulative trauma injury after May 2010. He concluded that she had not.

[2] Dr. Shaw's January 9, 2017 deposition, quoted by Mr. Malmuth, is not in EAMS. Though Exhibit 8 is listed as the January 9, 2017 deposition transcript, the transcript in EAMS is Dr. Shaw's October 5, 2017 deposition.

(Ex. 8. Deposition Testimony of Dr. Shaw, 10/5/17, 8:22-25.)

Dr. Stephen Heckman evaluated applicant's claim of injury to her psyche arising out of her industrial injury. He issued multiple reports, of which two supplemental reports were admitted into the record. For his May 31, 2018 report, Dr. Heckman conducted a re-evaluation, including testing, and diagnosed applicant with a Depressive Disorder, a Pain Disorder and an Insomnia Disorder. Her Global Assessment of Functioning score was 55, with moderate symptoms. He indicated applicant had made "very slight improvements in some aspects of her psychological functioning since my initial evaluation on March 13, 2015- although still quite symptomatic in many other aspects." (Ex. E. 5/31/18 Dr. Heckman Report, p. 45-47.) He concluded applicant's depressive disorder is "a secondary consequence of her physical industrial injury sustained on CT October 20, 1988-May 1, 2010, in addition to a Pain Disorder and Insomnia." (Ex. E. 5/31/18 Dr. Heckman Report, p. 47.)

> In summary, it remains my clinical opinion that Ms. Angeles suffered an industrially compensable psychological consequence injury that arose predominantly and greater than 51%, from her employment with Alameda Healthcare and Wellness Center, as a secondary and compensable consequence of her industrial injury of CT 10/20/88-05/01/10.
> (Ex. E. 5/31/18 Dr. Heckman Report, p. 48.)

Addressing apportionment, Dr. Heckman revised his previous 7% apportionment to non-industrial factors, and found no significant non-industrial factors contributing to her injury to her psyche. He found the factors contributing to her psychological condition, her chronic pain, loss of sense of purpose and the financial pressures related to her not being able to work, equally contributed to her permanent psychological disability.

> Although I had previously apportioned approximately 93% of Ms. Angeles' permanent psychological disability to the industrial injury at Alameda Healthcare and Wellness Center of CT 10/20/88-5/1/10, with 20% of the 33 1/3 % pertaining to chronic pain/limitations in functioning, or approximately 7% to pre-existing factors identified by Dr. Shaw previously, I am presently revising that opinion. As Dr. Shaw presently indicates no apportionment of any body parts other than to the subject CT injury of 10/20/88-5/1/10, there would now be no need for consideration of any of these factors with regard to apportionment of psychological disability.
> . . .
> In summary it is my clinical opinion that in all reasonable medical probability one hundred percent (100%) of Ms. Angeles' permanent psychological disability was caused by the direct result of the industrial injury at Alameda Healthcare

> and Wellness Center of CT 10/20/88-5/1/10, and that no percent (0%) was caused by other factors either before, concurrent, or subsequent to the industrial injury.
> (Ex. E. 5/31/18 Dr. Heckman Report, p. 51-52.)

Mr. Malmuth conducted vocational evaluations and issued several reports. He concluded that as a consequence of her industrial injury, applicant is not amenable to participate in vocational rehabilitation, has sustained a total loss of access to the labor market and a total loss of her future earning capacity.

> I believe that the combination of Ms. Angeles's industrial injuries, orthopedic to multiple body parts and psychiatric with the attendant functional limitations and the·synergistic interplay between them and after non-industrial apportionment to impairment considered pursuant to *Estrada* - and within a reasonable degree of vocational probability, will prevent her from being able to return to competitive employment within her pre-injury labor market (*Cordova*) or any other labor market whether traditional or non-traditional. For all practical purposes she has effectively sustained a total loss in her capacity to meet occupational demands (AMA Guides) a total loss of labor market access (*LeBoeuf*, *Livitsanos* and *Brodie*) and therefore a total loss of future earning capacity (SB-899/DFEC). Essentially with all functional and vocational factors considered Ms. Angeles is unemployable and unable to return to competitive employment. (LC 4662)
>
> Moreover the constellation of injuries and the functional limitations that flow from them, irrespective of "impermissible factors" render Ms. Angeles vocationally non-feasible or in the language of the Ogilvie Court, "not amenable to [any form of] vocational rehabilitation" for the purpose of returning to sustained competitive work.
> (Ex. 4. 1/29/18 Malmuth Voc. Eval., p. 9.)

Assessing applicant's amenability to vocational rehabilitation, Mr. Malmuth concluded that due to her "residual functional capacity to multiple body parts" applicant would be unable to participate in vocational retraining to obtain new skills to support a return to sustained competitive employment. (Ex. 4. 1/29/18 Malmuth Voc. Eval., p. 42-43.)

> Therefore, the combination of her functional limitations and pain documented in the medical reports and synergistic effect they produce, will result in Ms. Angeles's non-amenability to all forms of vocational rehabilitation for the purpose of retuning to sustained competitive employment. Therefore she has sustained a total loss in his [sic] capacity to meet occupational demands (AMA Guides) a total loss of labor market access (*LeBoeuf*) and a total loss of future earning capacity (2005 PDRS) irrespective of any "impermissible factors."
> (Ex. 4. 1/29/18 Malmuth Voc. Eval., p. 43.)

Addressing apportionment to non-industrial factors and other injuries, Mr. Malmuth noted Dr. Shaw's apportionment determination from his 2014 evaluation, in which Dr. Shaw apportioned 20% of applicant's WPI to non-industrial conditions for applicant's neck, bilateral shoulders, elbows and wrists. He also noted Dr. Heckman's 2015 apportionment opinion, in which Dr. Heckman apportioned 7% of applicant's psyche impairment to "other factor either before, concurrent, or subsequent to the industrial injury, in this case, the degree of pain and limitation in functioning secondary to pre-existing/ non-industrial orthopedic factors." (Ex. 4. 1/29/18 Malmuth Voc. Eval., p. 45.)

Mr. Malmuth, noting that "[v]ocational apportionment is not the same as medical apportionment," addressed applicant's 25 year work history at Alameda Healthcare & Wellness Center and her ability to perform her full duties without interference from prior work disabilities.

> Although she may have had some pre-existing medical impairments, these impairments do not seem to have resulted in any work disability. In fact, Ms. Angeles was capable of performing physically demanding work on a regular basis and did so successfully based on her progressive promotions to Medical Records Clerk and Supervisor.
>
> I found no evidence in the record that any of the aforementioned pre-existing non-industrial medical impairment adversely affected Ms. Angeles's earning capacity. Indeed, when she began working at Alameda Healthcare & Wellness Center in 1988 she earned $6.50 per hour and after 25 years she was earning $27.15 per hour at DOI.
>
> . . .
> By history and per the medical. records none of the functional limitations existed before the 5/1/10 injury, suggesting strongly that from a vocational perspective the 5/1/10 injury is the sole cause of the functional restrictions that result in Ms. Angeles non-amenability to all forms of vocational rehabilitation and an inability to return to work.
>
> Accordingly, and in the absence of medical information to the contrary, I conclude that the attendant functional limitations determined by Dr. Rachel Feinberg and endorsed by Dr. Shaw produce a vocationally significant and quantifiable synergistic effect that functionally eliminates any meaningful avenue or capacity to return to and maintain work in a competitive labor market whether at an on-site establishment or home based. Under this theory, and the facts of this case as I understand them this employee is totally disabled. (Ex. 4. 1/29/18 Malmuth Voc. Eval., p. 47-48.)

Mr. Malmuth prepared a supplemental report, dated January 18, 2019, to review additional medical information from Dr. Heckman. He noted that that Dr. Heckman found applicant's chronic insomnia would have an adverse effect on her ability to return to gainful employment, such that she would not be able to maintain regular attendance, complete a work day and work week, and work at a consistent pace. Mr. Malmuth noted that "Maintaining regular attendance and punctuality, the ability to complete a normal work day and work week, and the ability to perform at a consistent pace is an essential function required of all competitive work regardless of skill level." He found that Dr. Heckman's reporting supported his finding that applicant was not able to return to competitive employment.

> From my perspective anyone with orthopedic and psychological limitations similar to those of Ms. Angeles's will be incapable of working in any capacity for any employer since she would be unpredictably unavailable for work for various periods of time. No employer that I can think of would consider such random absences from the performance of their job on an ongoing basis other than intolerable.
> (Ex. 3. 1/18/19 Malmuth Voc. Report., p. 13.)

Defendant offered a supplemental report by its vocational expert, Howard Stauber, dated October 23, 2018, in rebuttal to Mr. Malmuth's 2018 report. Mr. Stauber also revisited his October 24, 2016, which is not in evidence. (Ex. F. 10/23/18 Stauber Supp. Vocational Report.) He concludes that applicant is amenable to vocational rehabilitation, by reference to his original report, and applies Labor Code section 4660.1 to his analysis.

> **In the Vilma Angeles case**, as extensively detailed and established via my prior (original) Vocational Evaluation Report, where (therein) I identify and support the availability of suitable, gainful employment. **It remains my determination that there is clear evidence as to, and in support of finding Ms. Angeles as being 'AMENABLE' to Vocational Rehabilitation***.
> ***** **It is clear that Ms. Angeles is not totally unemployable (even though her employment opportunities and/or earnings may be diminished)**; nor is there any medical reporting (QME, IME, and/or PTP) stating that Ms. Angeles is 100% disabled.
> Rather, the Medical Evaluations herein, while opining that Ms. Angeles may be precluded from a return to her usual and customary job, **they (Medical Evaluators) leave open Vocational Expert assessment as to whether suitable, alternative employment is available**.
> I acknowledge that the Vilma Angeles case must, currently, be assessed in accord with LC 4660.1. And, as such, it requires that "account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured worker, and his/her age at the time of injury."

(Ex. F. 10/23/18 Stauber Supp. Vocational Report, p. 2. [emphasis in original].)

Mr. Stauber criticized Mr. Malmuth's conclusions regarding applicant's amenability to participate in vocational rehabilitation to return to gainful employment, asserting he "has not allocated sufficient weight to job developed skills that remain available, and viable for Ms. Angeles to apply to a specific job market. Though Ms. Angeles may be precluded (medically) from a return to her usual and customary, that alone does not constitute the basis upon which to categorize her as non-amenable." (Ex. F. 10/23/18 Stauber Supp. Vocational Report, p. 3.) He further stated that he found a basis for vocational apportionment to non-industrial factors, which he identifies as "including AGE, MOTIVATION, EDUCATION; and PRE-INJURY MEDICAL CONDITIONS/MEDICAL HISTORY," as discussed in his prior report, which is not in evidence.

Mr. Stauber concluded that after apportionment, applicant's 56% DFEC, reduced by a factor of 15.1%, is 41%. (Ex. F. 10/23/18 Stauber Supp. Vocational Report, p. 6.)

DISCUSSION

Applicant contends the WCJ's finding of 74% permanent disability is not justified and that she has effectively rebutted the scheduled rating based on medical restrictions and the vocational evidence that establish that due to her orthopedic and psychological injuries, she has lost all of her labor market access and is not amenable to vocational rehabilitation.[3]

We concur with applicant that the record in this case establishes that she is permanently totally disabled, based upon substantial evidence that establishes that applicant is unable to benefit from vocational rehabilitation or return to full time employment in the labor market.

Labor Code section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), the proper application of the PDRS in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 614 [83

[3] Applicant makes additional contentions of error relating to the WCJ's rating, which are moot in view of our determination to find applicant is permanently totally disabled.

Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Almaraz/Guzman*). It may also be shown by rebutting the diminished future earning capacity factor supplied by the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd*. (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; c.f. *LeBoeuf v. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].)

To rebut a scheduled permanent disability rating, applicant must establish that her future earning capacity is actually less than that anticipated by the scheduled rating. The court in *Ogilvie*, *supra*, addressed the question of: "What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating?" (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the scheduled rating is based upon a determination that the injured worker is "not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating." The employee's diminished future earnings must be directly attributable to the employee's work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education. (*Ogilvie*, 197 Cal.App.4th at pp. 1274–1275, 1277.) The evidence in the record here is sufficient to rebut the scheduled rating.

The issue here is whether the vocational evidence constitutes substantial evidence to support the conclusion that applicant was permanently totally disabled due to her inability to benefit from vocational rehabilitation, per *Ogilvie*, *Dahl* and *LeBoeuf* .

In *Dahl*, the Court of Appeal held that to rebut the scheduled rating, applicant must prove that the industrial injury precludes vocational rehabilitation, writing in pertinent part as follows:

> The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach…It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule.
> (*Dahl*, 80 Cal.Comp.Cases at 1128.)

The vocational evidence here, the reporting of Mr. Malmuth, establishes that applicant is not amenable to vocational rehabilitation and that Dr. Shaw's and Dr. Feinberg's findings on applicant's functional capacity and work restrictions preclude applicant from returning to full time employment. Mr. Malmuth's "individualized assessment" of the vocational factors affecting applicant's ability to return to work shows that the medical restrictions do preclude applicant from gainful employment. We find his analysis of applicant's vocational limitations to constitute substantial evidence.

In her Opinion on Decision, the WCJ indicates a basis for her finding is that all of the evaluating physicians have apportioned to non-industrial and other industrial causes. The WCJ also discounts Mr. Malmuth's findings on the basis that he relies upon functional limitations that are not related to applicant's industrial injury.

With regard to apportionment, in his May 31, 2018 Report, Dr. Heckman revised his initial apportionment opinion and concluded that there is no non-industrial component to applicant's psyche disability. (Ex. E, 5/31/18 Dr. Heckman Report, p. 51-52.) Further, there is no medical evidence in this record from Dr. Shaw that constitutes a legally sufficient apportionment determination. As noted in our review of the medical evidence, much of Dr. Shaw's reporting was not offered into the evidentiary record. The medical reports that were submitted do not provide legal apportionment to non-industrial factors. Dr. Shaw initially apportioned 20% of applicant's permanent disability to non-industrial factors. He later changed his opinion and found 10% of applicant's permanent disability was caused by other factors. There are no medical reports from Dr. Shaw that either explain his change of opinion from 20% to 10%, such that we could find his later opinion to constitute substantial medical evidence, or that provide sufficient justification for his ultimate conclusion. As held in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (en banc), for a medical opinion on apportionment to constitute substantial evidence, it 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. The reports from Dr. Shaw that were offered into evidence to meet defendant's burden of proof to establish apportionment to non-industrial factors lack a discussion of the basis for his conclusions. We are provided his assertion of the existence of non-industrial factors, but no discussion of "how and why" these factors are causing permanent disability at the time of his evaluation, and "how and why" they are responsible for approximately 10% of applicant's permanent disability. (*Escobedo*, 70 Cal.Comp.Cases at 621-622.)

Further, applicant has effectively rebutted the scheduled rating of her permanent disability and has established that she is permanently totally disabled based on Mr. Malmuth's vocational reports that establish that the work restrictions identified by Dr. Feinberg's FCE, and endorsed by Dr. Shaw, preclude applicant from participating in vocational rehabilitation and from returning to competitive employment in the open labor market.

Accordingly, as our Decision After Reconsideration, we will amend the Findings and Award to find applicant is permanently totally disabled and will return this matter to the trial level for a new award of permanent total disability.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award, issued October 8, 2020, is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Vilma Angeles, while employed as a medical record supervisor, occupational group 211, by Alameda Healthcare & Wellness Center, in Alameda, California, sustained injury to her neck, upper extremities, nervous system, and other body systems during the cumulative trauma period through May 1, 2010. At the time of injury the employer's workers' compensation carrier was Ullico Casualty Company (currently in liquidation), administered by Intercare Insurance.

2. Applicant sustained permanent disability of 100%, entitling applicant to indemnity payable at her temporary disability rate, beginning May 23, 2014, less credit to defendant for permanent disability advances, in an amount to be adjusted by the parties, with jurisdiction reserved at the trial level.

3 Applicant is entitled to reasonable and necessary medical care.

4 Applicant's attorney is entitled to a reasonable attorney's fee equivalent to 15% of the permanent disability award, in an amount to be adjusted by the parties, with jurisdiction reserved at the trial level.

5. Defendant is entitled to credit for permanent disability advances paid to date.

AWARD

AWARD IS MADE in favor of **Vilma Angeles** against **Alameda Healthcare & Wellness Center; Ullico Casualty Company, in liquidation, administered by Intercare Insurance** as follows:

a. Permanent disability in accordance with Findings of Fact No. 2.

b. Future medical care in accordance with Findings of Fact No. 3.

c. Attorney fees in accordance with Finding of Fact No. 4.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 21, 2021

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

VILMA ANGELES
BOXER & GERSON
BENTHALE, MCKIBBIN & MCKNIGHT

SV/*pc*

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