

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

ALEX CARTER, *Applicant*

vs.

**STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS,
Legally Uninsured; STATE COMPENSATION INSURANCE FUND,
STATE CONTRACT SERVICES, *Defendants***

**Adjudication Number: ADJ9580793
Riverside District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of February 21, 2020, the Workers' Compensation Judge ("WCJ") found that applicant, while employed as a correctional counselor by the Department of Corrections during the period February 19, 1990 to July 22, 2014, sustained industrial injury to his knees, neck, low back, left hand/wrist, cardiac arrhythmia, hypertensive heart disease, gastrointestinal reflux disorder ("GERD"), right hip, varicose veins, and erectile dysfunction, that applicant is entitled to the heart trouble presumption of Labor Code section 3212.2, that the injury resulted in permanent and total disability "based on the addition method of applicant's cardiac arrhythmia and hypertensive heart disease," that the addition method provides a more accurate rating and assessment of applicant's impairment, that applicant is entitled to further medical treatment, and that applicant's claim for varicose veins is not barred by the statute of limitations.

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that the WCJ erred in relying on Dr. Tirmizi's medical opinion and in applying the additive method to find that applicant's heart conditions resulted in permanent and total disability, that the finding of permanent and total disability is inconsistent with the AMA Guides, that no permanent disability should be assigned to the diagnosis of cardiac arrhythmia, that applicant did

not sustain an injury to his right hip or in the form of erectile dysfunction during the period February 19, 1990 to July 22, 2014, and that applicant's claim of injury in the form of varicose veins is barred by the statute of limitations.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate except subsections (B.) and (D.) of section III, we will affirm the Findings and Award of February 21, 2020.

We further address defendant's contention that Dr. Tirmizi, the Panel Qualified Medical Evaluator ("PQME") in internal medicine, did not describe how applicant's cardiac arrhythmia and hypertensive heart disease affect his activities of daily living ("ADLs"). Defendant alleges that Dr. Tirmizi ignored the issue of ADLs in reference to the generalized criteria found in Chapters 3 and 4 of the AMA Guides. We disagree. The effects of applicant's cardiac arrhythmia¹ on his ADLs are inherent in Dr. Tirmizi's specific Whole Person Impairment ("WPI") rating of 35% under Table 3-11, Class 3, of the AMA Guides at page 56. (Tirmizi report dated 1/3/18, applicant's Exhibit 2, p. 10.)

Defendant further alleges that applicant is not permanently and totally disabled according to a definition found on page five of the AMA Guides, which describes a 90-100% WPI as indicating very severe organ or body system impairment requiring an individual to be fully dependent on others for self-care, approaching death. This allegation lacks merit because Dr. Tirmizi's rating of applicant's WPI for cardiac arrhythmia at 35% WPI does not approach 90-100%; the same is true of Dr. Tirmizi's rating of applicant's hypertensive heart disease at 65% WPI. Further, defendant's allegation that applicant's supposedly negligible impairment is "almost the antithesis" of the AMA Guides' general description of WPI at 90-100%, is not based on any medical evidence in the record. (Petition for Reconsideration, p. 6.)

At pages six and seven of its petition, defendant also contends that applicant's industrial cardiac arrhythmia resulted in no permanent disability. Defendant alleges that after applicant underwent a cardiac ablation procedure in August 2017, he had a normal EKG test, so he must

¹ Defendant does not specifically challenge Dr. Tirmizi's finding of 65% WPI for applicant's hypertensive heart disease, thus waiving the issue pursuant to Labor Code section 5904. (See Petition for Reconsideration, pp. 3-5.)

have been cured of cardiac arrhythmia. The allegation is based on the false tautology that a normal EKG equals a cure. In his deposition of June 6, 2018 (p. 20), however, Dr. Tirmizi specifically rejected the notion that the normal EKG test showed applicant was cured of cardiac arrhythmia after the ablation procedure. (Applicant's Exhibit 1.) We further note that defendant's allegation is undercut by its stipulation at trial on January 16, 2020 that applicant sustained industrial injury in the form of cardiac arrhythmia. (See *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 [52 Cal.Comp.Cases 419]); *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377 (61 Cal.Comp.Cases 554) [party not permitted to withdraw from stipulation absent showing of good cause].)

As for the WCJ's finding of permanent and total disability, defendant contends that the WCJ erred in relying upon Dr. Tirmizi's medical opinion to add, rather than combine on the Combined Values Chart ("CVC"),² the disabilities resulting from applicant's hypertensive heart disease and cardiac arrhythmia. Again, we disagree.

As a general rule, the goal of formulating a valid impairment rating under *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] is to approximate the rating that accurately reflects the injured employee's actual impairment, which may or may not be the highest rating, depending on the facts of the case at hand. (*City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360, 1364-1365 [79 Cal.Comp.Cases 1].)

In the context of combining versus adding permanent impairments, the Appeals Board panel in *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.) adopted the WCJ's approach of adding permanent disabilities rather than combining them under the CVC; the basis for addition rather than combination of the disabilities was "the synergistic effect of one hip injury upon another opposite hip injury." Specifically, the Board panel adopted the following analysis provided by the WCJ:

Turning to Dr. Cheng's determination that simple addition of applicant's left and right hip impairments provided a more accurate depiction of his overall impairment than application of the reduction formula, the WCJ stated in relevant part:

² The Combined Values Chart is found at pages 8-1 through 8-4 of the 2005 Schedule for Rating Permanent Disabilities ("PDRS").

Dr. Cheng points to the synergistic effect of one hip injury upon another opposite hip injury. I agree. It appears logical that a person who is able to compensate through the opposite member for an injury to one limb is to some extent less disabled or impaired than someone who cannot so compensate.

...

I remain persuaded that the QME has appropriately determined that the impairment resulting from applicant's left and right hip injuries is most accurately combined using simple addition than by use of the combined-values formula.

In *Taina v. County of Santa Clara/Valley Medical Center* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 344, the panel of the Appeals Board further explained, "disability values of multiple impairments may be added instead of combined using the CVC if that provides an accurate rating, particularly when there is no overlap, and when the synergistic effect of the multiple disabilities supports that method of combination." (Slip opinion, at pp. 10-11.) Further, as stated by the Appeals Board panel in *De La Cerda v. Martin Selko & Co.* (2017) 83 Cal.Comp.Cases 567 (written.), the fact that an AME (for instance) does "not use the term 'synergistic' to advocate for the use of the additive rating method is not determinative of the validity of using that method. The impairments may be added *if substantial medical evidence supports the physician's opinion that adding them will result in a more accurate rating* of the applicant's level of disability than the rating resulting from the use of the CVC." (Italics added.) Of course, the opinion of an evaluating physician who finds a synergistic effect between injuries or disabilities, so as to justify addition rather than combination to most accurately rate permanent disability, must comply with the usual requirements of substantial evidence. (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 620-621 [Appeals Board en banc].)

In this case, the opinion expressed by Dr. Tirmizi in his deposition of March 16, 2016 meets the substantial evidence test noted above. The doctor testified that in applicant's case, it is intuitive and logical that his heart is being targeted by two separate kinds of injuries, so the effect is synergistic and not "compressive." Consequently, adding the disabilities from the two injuries is the most medically accurate way of evaluating applicant's disability. (Applicant's exhibit 4, Tirmizi deposition of 3/16/16, pp. 7-8.) Upon cross-examination, the doctor testified that he was not relying on scientific studies but on his own medical expertise to support adding rather than

combining applicant's cardiovascular disabilities, to a reasonable medical probability. (*Id.*, pp. 12-16.) Dr. Tirmizi's reliance on his own medical expertise and judgment in evaluating applicant's disability meets the test of substantial evidence. Contrary to defendant's petition for reconsideration (5:11-23), Dr. Tirmizi was not required to rely upon "objective scientific evidence" or "prevailing medical opinion" because reasonable medical probability, not medical certainty, is the test of substantial evidence. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].)

In reference to the WCJ's finding of industrial erectile dysfunction, it appears defendant alleges applicant did not sustain a cumulative trauma through July 22, 2014 because applicant already had erectile dysfunction in 2004 due to a vasectomy, not in 2015 when applicant informed Dr. Tirmizi that his complaints started when he began taking medication for his heart. (Petition for Reconsideration, p. 10.) We reject the allegation. The fact that applicant had complaints of erectile dysfunction after undergoing a vasectomy does not preclude a finding that his industrial heart conditions also aggravated or contributed to the dysfunction, as opined by Dr. Tirmizi in his deposition of June 6, 2018, applicant's exhibit 1 at pp. 9-11. (*South Coast Framing v. Workers' Comp. Appeals. Bd.* (2015) 61 Cal.4th 291 (80 Cal.Comp.Cases 489) [affirming industrial injury where employment is a contributing cause of the injury].)

Turning to the WCJ's finding of industrial varicose veins, defendant contends that this injury is barred by the one-year statute of limitations of Labor Code section 5405. Defendant alleges that it has been more than one year since applicant received medical treatment for a prior claim of cumulative trauma for the period February 19, 1990 through February 2, 2000. Again, this allegation is contradicted by the medical record. In his deposition of September 23, 2015, Dr. Tirmizi explained that applicant's employment as a correctional counselor continued exposing his condition of varicose veins to further injury after 2000 and continuing. (Applicant's exhibit 6, Tirmizi deposition of 9/23/15, p. 57.) Thus, the substance of applicant's claim of injury for the period February 19, 1990 through July 22, 2014 is the previously uncompensated period from 2000 through 2014, for which no statute of limitations defense is raised. In footnote 13 of its petition for reconsideration, defendant improperly cites to a 2014 Thermal Ablation Study published in the *Scientific World Journal*, which is not in evidence. In any event, the study does not rebut Dr. Tirmizi's opinion, specific to this case, that applicant's varicose veins are industrially-related due

to the prolonged standing required by his job. (Applicant's exhibit 6, Tirmizi deposition of 9/23/15, p. 57.)

Finally, defendant contends that applicant did not sustain an industrial injury to his right hip during the period February 19, 1990 to July 22, 2014. However, defendant's objection goes to the date of injury, not to the existence of the injury itself. Specifically, defendant alleges that under Labor Code section 5412, the date of injury is February 19, 1990 to November 13, 2017. We reject the allegation for two reasons. First, at trial defendant did not raise a statute of limitations defense to the claimed right hip injury, so the defense is not properly raised now. (*U.S. Auto Stores v. Workers' Comp. Appeals Bd. (Brenner)* (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases 173; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd. (Henry)* (2001) 66 Cal.Comp.Cases 1220 (writ den.); *Hollingsworth v Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ den.) [objection is waived if not raised at first hearing in which it is proper to do so].) Second, defendant cites a review of records in Dr. Gumbs' report dated July 24, 2018 (p. 4) that "mentions" right hip complaints reported by Dr. Fait on November 13, 2017, but this "mention" does not demonstrate Dr. Fait advised applicant his right hip complaints were work-related. Absent such advice, applicant is not chargeable with knowledge that his cumulative trauma injury was industrial in nature for purposes of establishing the date of injury under section 5412. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of February 21, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 8, 2022

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

**ALEX CARTER
WHITING, COTTER & HURLIMANN, LLP
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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

I
INTRODUCTION

<u>Date of Injury:</u>	2/19/1990-7/22/2014
<u>Age on DOI:</u>	50
<u>Occupation:</u>	Correctional Counselor
<u>Parts of Body Injured:</u>	Ortho, heart and internal
<u>Identity of Petitioner:</u>	Defendant
<u>Timeliness:</u>	The petition was timely filed on March 11, 2020
<u>Verification:</u>	The petition was verified
<u>Date of Award and Order:</u>	February 21, 2020
<u>Petitioner's Contentions:</u>	Petitioner contends the WCJ erred by finding: A. There was substantial evidence to support the findings; B. Applicant is permanently totally disabled; C. Permanent disability for cardiac arrhythmia; D. Right hip compensable; E. Varicose veins was not barred by the statute of limitations; and, F. Erectile dysfunction is compensable.

Petitioner, defendant, by and through its attorney of record, has filed a timely verified Petition for Reconsideration on March 11, 2020, challenging the Findings and Award dated February 21, 2020 for case ADJ9580793; Defendant did not challenge the companion case ADJ11186905.

Applicant, the Respondent, filed an Answer on March 16, 2020, rejecting Defendant's arguments, providing additional insight of the facts, and asserting the petition should be denied in full.

In its Petition for Reconsideration, Petitioner argues that the Judge and Board acted without or in excess of its powers, the evidence does not justify the Findings of Fact and that the Findings of Fact do not support the decision.

It is recommended that reconsideration be denied.

II
FACTS AND PROCEDURAL HISTORY

Alex Carter, the applicant, born [], while employed during the period of February 19, 1990 to July 22, 2014, as an Correctional Counselor, occupational group number 490, at Norco, California, by the State of California, Department of Corrections, sustained injury arising out of an in the course of employment to his knees, neck, low back, left hand/wrist, cardiac arrhythmia and hypertensive heart disease; and claims to have sustained injury arising out of and in the course of employment to his sleep apnea, insomnia, GERD, right hip, varicose veins and erectile dysfunction.

Trial on both cases were held on January 16, 2020, and the parties waived testimony. On the day of trial, the parties further stipulated to dismiss applicant's Petition for costs and sanctions dated January 8, 2020 in exchange for accepting AOE/COE for the cardiac arrhythmia. (MOH/SOE Trial 1/16/20, pg. 2:21-23.)

The undersigned issued a decision on February 21, 2020, and found applicant was 100% disabled based on the addition method of applicant's cardiac arrhythmia and hypertensive heart disease. Applicant sustained injury arising out of an in the course of employment to his knees, neck, low back, left hand/wrist, cardiac arrhythmia and hypertensive heart disease. The court also found compensable the applicant's additional parts and conditions which consist of GERD, right hip, varicose veins and erectile dysfunction, but not the sleep apnea and insomnia. Applicant's claim for varicose veins was not barred by the statute of limitations.

Petitioner filed its petition for reconsideration of the cumulative trauma case (ADJ9580793) on March 11, 2020. Applicant filed an Answer on March 16, 2020.

III **DISCUSSION**

A. Substantial evidence supported the Findings.

Defendant's first contention is substantial evidence does not support the findings, and then referenced the AMA Guides. (Petition for Reconsideration dated 3/11/20, pg. 3.)

Defendant acknowledged applicant has been diagnosed with hypertensive heart disease and cardiac arrhythmia, and Omar Tirmizi, M.D., the internal medicine qualified medical evaluator ("QME"). (Petition for Reconsideration 3/11/20, pg. 3:23-24.) The undersigned found Dr. Tirmizi's opinions constituted substantial medical evidence because he provided logical reasoning for his conclusions as supported by his depositions and reports.

The Opinion on Decision dated February 21, 2020 stated on page 5:

In a noteworthy panel decision, the WCAB in *Taina v. County of Santa Clara/Valley Medical Center*, 2018 Cal. Wrk. Comp. P.D. LEXIS --, affirmed the WCJ and held that the WCJ did not err by determining the level of permanent disability caused by applicant's October 4, 2011 neck, shoulder and psychiatric injuries by adding orthopedic and psychiatric disabilities to find 87 percent permanent disability, rather than by combining percentages of permanent disability using the Combined Values Chart ("CVC"). The agreed medical evaluators determined that the disabilities caused by applicant's orthopedic and psychiatric injuries did not overlap and that adding those separate values provided an accurate overall permanent disability rating. The WCAB noted that the disability values of multiple impairments may be added instead of combined, using the CVC if that provides a more accurate rating, particularly if there is no overlap and when the synergistic effect of multiple disabilities supports

that method of combination, and that adding disabilities is supported by the AMA Guides, as shown by the discussion of the trier of fact's role provided in Chapters 1.4 and 1.5 on pages 9 and 10 of AMA Guides.

In this case, Dr. Tirmizi opined the addition method was the most medically accurate way because applicant's heart is being targeted by two separate kinds of injuries. (Deposition of Syed Omar Tirmizi, M.D., dated 3/16/16, Exhibit 4, pp. 7-8 and 12-14.) Thus, applicant is 100% disabled based on the addition method of applicant's cardiac arrhythmia and hypertensive heart disease.

[...]

C. Assignment of permanent disability to cardiac arrhythmia.

Defendant asserts no permanent disability should be assigned to the diagnosis of applicant's cardiac arrhythmia. (Petition for Reconsideration 3/11/20, pp. 6-7.)

Defendant supports its position with Labor Code sections 4660.1, subdivision (a) and 4600. Defendant correctly states the "Guides provide direction as to how a medical evaluation is to be performed." (Petition for Reconsideration 3/11/20, pg. 7:6-9.) However, such determination or procedure is neither definitive nor conclusive, but rather a direction.

In this case and with the application of the heart trouble presumption of Labor Code section 3212.2, permanent disability should apply to cardiac arrhythmia because applicant continues to have symptoms of palpitations and shortness of breath. The Opinion on Decision dated February 21, 2020 stated the following on pages 3 and 5:

Applicant meets the qualifications of this presumption, and there was no evidence to controvert it. Applicant was an officer who had custodial duties labeled as a Correctional Counselor, as defined by the job descriptions according to Exhibits U, V and W, occupational group number 490, at Norco, California, by the State of California, Department of Corrections. Applicant has heart trouble in the form of mild concentric left ventricular hypertrophy as confirmed by the medical record including the opinions of Dr. Tirmizi who found the heart industrial, applicant still has shortness of breath (QME report of Dr. Tirmizi dated 1/3/18, Exhibit 2, pp. 3, 10 & 11), and the echocardiogram taken on May 19, 2016 (Exhibit C).

Thus, applicant's cardiac arrhythmia and hypertensive heart disease are presumed compensable.

In this case, Dr. Tirmizi opined the addition method was the most medically accurate way because applicant's heart is being targeted by two separate kinds of injuries. (Deposition of Syed Omar Tirmizi, M.D., dated

3/16/16, Exhibit 4, pp. 7-8 and 12-14.) Thus, applicant is 100% disabled based on the addition method of applicant's cardiac arrhythmia and hypertensive heart disease.

[...]

E. Varicose veins was not barred by the statute of limitations.

Defendant asserts applicant's claim of varicose veins was barred by the statute of limitations. (Petition for Reconsideration 3/11/20, pg. 8-9.)

Defendant did not meet its burden of this affirmative defense due to lack of evidence. Defendant's supporting evidence refers to applicant's deposition, benefit paid report and IDL history report. (Please see Footnotes on page 9 of Defendant's Petition for Reconsideration dated 3/11/20.) However, there was no medical reports or letters advising applicant's due process rights of the claim contemporaneously to the alleged filing of the legs claim on or about February 2, 2000.

The Opinion on Decision dated February 21, 2020 stated on page 6:

The burden of proof rests upon the party holding the affirmative of the issue according to Labor Code section 5705. Here, defendant is asserting a statutory defense, asserting applicant's claim for varicose veins should be barred by the statute of limitations.

The court disagrees. There is no evidence to support defendant's argument. Moreover, defendant had accepted liability for applicant's claim which included varicose veins in partial denial letters dated February 16, 2016 (Exhibit R), September 25, 2017 (Exhibit N), December 4, 2017 (Exhibit O or Exhibit 20), and February 8, 2018 (Exhibit P).

F. Erectile dysfunction is compensable.

Defendant claims applicant did not sustain an injury of erectile dysfunction. (Petition for Reconsideration 3/11/20, pg. 10.)

The undersigned finds Defendant's assertion disingenuous because Defendant had accepted liability for this claim which included erectile dysfunction in a letter dated December 4, 2017 (Exhibit O or Exhibit 20.)

Moreover, Dr. Tirmizi opined applicant's sexual dysfunction was related to applicant's cardiac medication. (Deposition of Omar Tirmizi, M.D., dated 6/6/18, Exhibit 1, pg. 11:1-5; QME report of Dr. Tirmizi dated 3/11/15, Exhibit 7, pg. 14.)

IV
RECOMMENDATION

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

DATE: March 30, 2020

Respectfully submitted,

Eric Yee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE