WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DENNIS NORWOOD, *Applicant*

vs.

BLU HOMES, INC.;
CYPRESS INSURANCE COMPANY, administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ9801759
Santa Rosa District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and the Opinion on Decision, both of which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 4, 2021

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

DENNIS NORWOOD
LAW OFFICE OF JOHN BLOOM
LAW OFFICE OF MICHAEL SULLIVAN

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Defendant, Blu Homes, Inc. insured by Cypress Insurance administered by Berkshire Hathaway Homestate Companies, through their attorney of record Nancy Hill, filed a timely, verified Petition for Reconsideration challenging the Findings and Award dated March 23, 2021.

Applicant suffered an industrial injury to his back, left knee, psych, and reproductive system as a result of a specific injury on February 22, 2012 during the course of his employment as a general contractor for the employer, Blu Homes, Inc. The injury occurred when the applicant was helping to place a floor and a floor board fell causing him to slip directly onto his left knee. He was age 47 on the date of injury.

In the F&A, the undersigned WCJ found that the applicant's injury caused total permanent disability of 100% based on the opinions of the QME Boukje Eerkens, Psy.D. as well as the applicant's vocational expert, Scott Simon, M.S.

Petitioner contends:

a. PQME Dr. Eerkens' opinion does not constitute substantial medical evidence. (Petition page 2, line 17 to page 9, line 24.)
b. Applicant is not totally permanently disabled because he is amenable to vocational rehabilitation. (Petition page 10, line 1 to page 15, line 15.)

II FACTS

Applicant Dennis Norwood suffered an injury in the course of his employment as a general contractor for Blu Homes, Inc. to his back, left knee, psych, and reproductive system. The injury occurred on February 12, 2012, when the applicant was helping to place a floor, and a floor board fell causing him to slip directly onto his left knee.

The applicant initially underwent a knee arthroscopy in 2012 and a lateral release and medial patellofemoral ligament reconstruction in 2013. (Jt. Exh. 12, Dr. McGahan, 2/20/19.) A year later, in 2014, the applicant underwent a third knee arthroscopy. Utilization Review denied a subsequent knee arthroscopy in 2018, which resulted in the applicant obtaining the procedure through his private insurance. (Id.) The applicant sustained a compensable industrial to his lumbar spine as a result of a gait disturbance from his left knee. (Jt. Exh. 12, Dr. McGahan, 2/20/19.) He has not worked since the date of injury. (MOH/SOE, p. 6, lines 34-35.)

Over the course of six years, the psychiatric Qualified Medical Evaluator (QME), Boukje Eerkens, Psy.D., has issued three evaluating reports, one supplemental report, two Residual Functional Capacity Forms and availed herself to a deposition at the defendant's request.

Dr. Eerkens deemed the applicant to be permanent and stationary on January 14, 2017 and issued a Global Assessment of Function (GAF) score of 57, corresponding to a Whole Person Impairment (WPI) Rating of 20. (Jt. Exh. 6, Dr. Eerkens, 1/14/17.) No apportionment was provided. (Id.)

Dr. Eerkens subsequently amended the permanent and stationary date to the date of the third QME evaluation, July 6, 2019 due to 'denied authorization for proper treatment by utilization review which caused a worsening in his depression'. (Jt. Exh. 3, Dr. Eerkens, 7/6/19.) The applicant's GAF score was increased to 53, equivalent to a WPI of 26. (Id.) According to Dr. Eerkens, the applicant was 'somewhat suicidal'. (Jt. Exh. 1, Dr. Eerkens deposition, p. 13, lines 10-11.). Dr. Eerkens identified two non-industrial stressors, but concluded that 100 percent of the causation of the applicant's psychological disability stems from his work injury. (Jt. Exh. 1, Dr. Eerkens deposition, p. 56, lines 18-21.) Dr. Eerkens testified that the applicant is psychologically totally disabled. (Jt. Exh. 1, Dr. Eerkens deposition p. 51, line 25- p. 52, line 4.)

Regarding the severity of applicant's psychological symptoms, Dr. Eerkens opined:

> "Frankly, it is absurd to say that this man with a severe chronic pain condition and significant loss of activities of daily living rendering him unable to do the work that he loves, is not depressed. In fact, any reasonable individual- including those not trained in psychology- would agree that when Mr. Norwood walks into a room, his irritability and hopelessness is palpable." (Jt. Exh. 3, Dr. Eerkens, 7/6/19.)

Patrick McGahan, M.D. acted as the parties orthopedic QME. In his evaluating report of February 20, 2019, he issued 8% WPI for the lumbar spine, 10% WPI for the left knee cruciate ligament laxity and a 10% WPI for the left knee arthritis, (Jt. Exh. 12, Dr. McGahan, 2/20/19.) Dr. McGahan apportioned 20% of the left knee arthritis impairment to a pre-existing condition. He provided permanent work restrictions as follows: an office-based job, allowance to alternate sit and stand as needed, and to use a cane as needed. (Jt. Exh. 12, Dr. McGahan, 2/20/19.)

Finally, the internal medicine QME, Scott Anderson, M.D. found industrial causation for the applicant's erectile dysfunction and issued 20% WPI. (Jt. Exh. 8, Dr. Anderson, 1/18/16.) No work restrictions were imposed from an internal medicine standpoint. (Id.)

The applicant was evaluated by two vocational experts, Scott Simon, M.S. as the applicant's expert and Emily Tincher, M.S. as the defendant's expert. Mr. Simon opined that the applicant is unable to return to the workforce, and should be considered totally disabled, i.e. not amenable to rehabilitation. (App. Exh. 9, Mr. Simon, 12/3/19.) Ms. Tincher, on the other hand, concluded that the applicant is amenable to vocational rehabilitation and identified a number of jobs that can accommodate the applicant's work restrictions. (Def. Exh. A, Ms. Tincher, 5/22/20.)

This matter was tried on the issues of permanent disability, apportionment, attorney fees, applicability of 15% increase per Labor Code §4658(d)(2), applicant's penalty petition, attorney's fees and whether Dr. Eerkens' reporting constitutes substantial medical evidence.

At trial, applicant testified in substance as follows. He experiences a half day's worth of pain before he can 'get it under control'. (MOH/SOE, p. 6, lines 41-42.) He has to use a cane most of the time. His doctors told him that the cane helps him stabilize, so he doesn't reinjure himself. (MOH/SOE, p. 7, lines 3-5.) He tries to take his dog to the park with grass, so if he falls, it's a safer

environment, and not concrete. (MOH/SOE, p. 7, lines 13-15.) He usually takes two Norco in the morning, then periodically, one to two throughout the day. (MOH/SOE, p. 7, 23-24.) The applicant takes breaks to relieve pain in his lounge chair, to put his legs in the air about three to four times a day for 10 to 15 minutes at a time. (MOH/SOE, p. 7, lines 40-42.) He will probably get about five hours of sleep when it's interrupted by discomfort in his left leg and back, and then tries to reposition to try to get more rest. (MOH/SOE, p. 7, lines 34-36.)

The applicant lives with his wife, who does the chores, grocery shopping, cleaning, vacuuming, and mopping. He wife takes the trash out, does the laundry and prepares the meals, unless the applicant makes a bowl of soup. His wife cleans up the dishes and changes sheets. (MOH/SOE p. 7, lines 13-17.) The applicant is not able to focus, all he thinks about is his pain and it affects his concentration. (MOH/SOE, p. 7, lines 38; 46-47.) He doesn't communicate much with people, besides his wife and his doctors. (MOH/SOE, p. 8, lines 19-20.)

An F&A issued finding that the strict AMA Guides rating of 75% permanent disability had been rebutted and applicant's injury caused total permanent disability of 100% based on the opinions of both the QME Dr. Eerkens and applicant's vocational expert, Scott Simon, M.S.

It is from this Findings and Award that petitioner seeks reconsideration.

III

DISCUSSION

A. THE REPORTS OF DR. EERKENS ARE SUBSTANTIAL MEDICAL EVIDENCE AND CAN BE THE SOLE BASIS FOR AN AWARD OF 100%.

Petitioner asserts that Dr. Eerkens reporting cannot constitute substantial medical evidence because no psychological testing was administered on her third evaluation of the applicant on July 6, 2019. (Petition p. 4, lines 13-14.) Yet, the petitioner fails to cite any legal authority or section within Chapter 14 of the AMA Guides, which require repeated psychological testing in order for the QME report to be considered substantial.

Dr. Eerkens testified that the applicant was in a lot of pain at his evaluation and couldn't sit through psychological testing and she didn't think that more testing would have changed her findings. (Jt. Exh. 1, Dr. Eerkens deposition, p. 9, lines 6-18.) Dr. Eerkens stated that she does not administer testing in every case. (Jt. Exh. 1, Dr. Eerkens p. 10, lines 1-3.) To compel an injured worker to endure psychological testing, when they are physically unable to maintain a prolonged seated position, as here, could produce inaccurate results and a potential worsening of both their mental and physical conditions.

Notwithstanding the above, the petitioner's argument ignores that measuring psychological impairments are inherently subjective and distinctive from the other AMA Guides chapters. There is no whole person impairment derived from a psychological test to objectively measure or assess disability pursuant to Chapter 14 of the AMA Guides. "Unlike cases with some organ systems, there are no precise measures of impairment in mental disorders. The use of percentages implies a certainty that does not exist." (AMA Guides p. 361.)

Petitioner erroneously states that Dr. Eerkens did not address non-industrial apportionment. (Petition p. 5, line 23.) A review of the record renders this contention meritless. Notably absent from the argument is that the petitioner, herself, questioned Dr. Eerkens in a deposition at length about her apportionment opinion.

> Q: Okay. And later on in this report, basically, you indicated that that was not something you saw as something you could apportion any part of his current situation with. Can you explain that a little bit more for me?
>
> A: Yeah. Because that was still a year ago, typically, if somebody is still grieving a year later, that's considered-that's a whole separate, like, disorder in a way. There's no reason that grieving can't take place in a shorter period of time. And it sounds like it did for him, that he lost his father, went through that, and you know, would be grieving a year later.
>
> …
>
> Q: But you in no way found that that actually continued to affect him at this point in time?
>
> A: I have no evidence to say otherwise.
> (Jt. Exh. 1, Dr. Eerkens' deposition, p. 24, lines 5-23.)

A medical report is not rendered unsubstantial merely because the physician does not apportion disability to non-industrial causes. It is sufficient that Dr. Eerkens considered non-industrial stressors including the death of applicant's father and his relationship with his daughter, and then conclude that these events did not contribute to the applicant's permanent disability. (Jt. Exh. 3, Dr. Eerkens, 7/6/19.) It is only required that the report include an apportionment opinion to be considered complete, not that the evaluator find apportionment. (Labor Code §4663(c)). If the non-industrial factors have not caused permanent disability, then there can be no apportionment. Here, Dr. Eerkens' apportionment opinion is well reasoned and is considered substantial.

Petitioner relies on the documented lack of psychological symptoms observed by the applicant's orthopedic surgeon, Mark Schakel, M.D. to discredit the severity of the applicant's psychological condition. Specifically, according to the petitioner, it shows that "the Applicant did not feel the need to present his psychological issues to Dr. Schakel despite years of being provided a form in which to do so". (Petition, p. 7, lines 21-22.)

Dr. Schakel's reports or these 'forms' were not offered into evidence but apparently include unchanged boilerplate language, claiming that the applicant has "no mood change, depression or nervousness". (Petition, p. 9, lines 7-8.) Yet, the applicant specifically reported that Dr. Schakel never asked him about his emotional state. (Jt. Exh. 3, Dr. Eerkens, 7/6/19.) According to the psychological QME, Dr. Eerkens, this repetitive statement of Dr. Schakel appears to be an oversight and/or a cutting and pasting of standard text form prior reports without any evidence-based methodology to confirm its validity. (Jt. Exh. 3, Dr. Eerkens, 7/6/19.)

Regardless, considering the record as a whole, the court places more weight in the opinions of a licensed clinical psychologist and trained Qualified Medical Evaluator than in the repeated one line annotation within the orthopedic surgeon treatment reports.

Petitioner's alleged deficiencies of Dr. Eerkens opinions were adequately addressed in her deposition and evaluating reports. Dr. Eerkens performed thorough evaluations, completed supplemental reports and provided deposition testimony over a span of six years on a difficult and unfortunate case. The functional limitations imposed by Dr. Eerkens, standing alone, are sufficient to document a diminished work capacity that greatly outweigh the ratable impairment within the AMA guides, before considering the vocational evidence.

B. THE SUBSTANTIAL REPORTING OF THE APPLICANT'S VOCATIONAL EXPERT, SCOTT SIMON, SERVE AS A SEPARATE BASIS TO SUPPORT PERMANENT TOTAL DISABILITY.

The scheduled rating is 'prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule'. (Labor Code §4660(c).) While the medical reports rate at 75% permanent disability, a finding of permanent disability may be based upon vocational evidence that establishes applicant's inability to participate in vocational rehabilitation and inability to return to gainful employment. (*Ogilvie v. City and County of San Francisco* (2011) 197 Cal. App, 4th 1262.)

Here, that showing is made. Mr. Simon persuasively opines that applicant is unemployable, has a total loss of earning capacity, and is not amendable to retraining, (App. Exh 9, Mr. Simon, 12/3/19.) The comprehensive vocational assessment offered by Mr. Simon relies upon his own objective testing, substantial medical evidence, and an individualized valuation of the applicant's employability.

Petitioner asserts that Mr. Simon's opinion is, instead, based on several erroneous facts presented by the applicant, including his use of a cane and engagement in social interactions, (Petition p. 11, line 10.) To support this claim, the petitioner references the surveillance video presented at trial. The surveillance video documented the applicant at a dog park, post office and Rite Aid on the afternoon of September 22, 2020, without using a cane. (MOH/SOE p. 24-25.)

However, this isolated instance, by itself, is not determinative nor renders Mr. Simon's finding of permanent and total disability void. Mr. Simon's conclusion that the applicant is unemployable was based on the record as a whole and did not hinge solely on applicant's cane use. According to Mr. Simon,

> "while there may be a limited number of employment opportunities which would comport with the functional work restrictions as outlined by Dr. McGahan, overall when the psychiatric facts are added, together with chronic pain, in my opinion no employment opportunities remain available to Mr. Norwood,"
> (Jt. Exh, 9, Mr. Simon, 12/3/19)

Similarly, petitioner relies on the surveillance video to question the veracity of Mr. Simon's statement that the applicant 'tries whenever possible to avoid social contacts'. (Petition p. 11, lines 20-24.) According to the petitioner, applicant's visits to Jackson's Thrift & More, a dog park, a post office and Rite Aid, all 'requiring social interaction', renders Mr. Simon's opinion unsubstantial. (Petition p. 11, line 20- p. 12, line 5.) The court finds this argument meritless.

The applicant is not seen speaking to anyone on the surveillance video. In fact, of the six days recorded, the applicant was only seen leaving his house in two instances. (MOH/SOE, p. 11.) There is no footage of Jackson's Thrift & More. (MOH/SOE, p. 10, lines 42-43.) Even petitioner fails to cite a specific instance on the surveillance video where the applicant is actually engaging or speaking with another person. Applicant's mere presence at a location open to the public, is insufficient evidence of show the requisite sustained social interaction necessarily to perform full time employment.

The finding that the scheduled rating was rebutted is not disrupted merely because the applicant was seen not using a cane while frequenting public places one afternoon. The court's finding is based on Mr. Simon's substantial opinion regarding the applicant's lack of transferable skills, inability to benefit from retraining, and complete loss of earning capacity. (App. Exh. 9, Mr. Simon, 12/3/19.)

It is based on this reporting, which this court finds substantial, coupled with the considerable medical legal reporting and the applicant's testimony, that the applicant is permanent and total. The undersigned WCJ carefully considered the reports of both Mr. Simon and Ms. Tincher and determined the opinion of Scott Simon was most consistent with the limitations imposed by the QME's and the applicant's credible testimony at trial. There is nothing in defendant's petition to disrupt the overall combined permanent disability value of 75% pursuant to the rebuttable scheduled rating, nor the ultimate conclusion that the schedule was rebutted and that applicant is 100% permanently disabled.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: April 26, 2021

Respectfully submitted,

Katie F. Boriolo
WORKERS' COMPENSATION
ADMINISTRA TIVE LAW JUDGE

OPINION ON DECISION

PERMANENT DISABILITY AND APPORTIONMENT

Based on the reporting of the QMEs Dr. Eerkins, Dr. Anderson, and Dr. McGahan, the permanent disability is set forth below:

Psych:	14.01.00.00-26-[8]36-380H-42-46
Sexual Dysfunction:	80(07.05.010.00-20-[2]23-380F-23-26)21
Lumbar Spine:	15.03.0l.00-8-[5]10-380H-13-15
Left Knee:	Arthritis: .80(17.05.03.00-10-[2] 11-380I-16-18)14 Cruciate Ligament Laxity: 17.05.10.05-10-[2]11-380I-16-18
	Left knee: 18 c 14= 29

46 c 29c21 c 15=75%

The defendant satisfied their burden of proof on non-industrial apportionment for the sexual dysfunction and left knee arthritis. The internal medicine QME, Dr. Anderson apportioned 20% of the applicant's sexual dysfunction disability to non-industrial factors including cigarette smoking and degenerative processes. (Jt. Exh. 8, Dr. Anderson, 7/17/19.) Dr. McGahan apportioned 20% of the left knee arthritis impairment to pre-existing arthritis. (Jt. Exh. 11, Dr. McGahan, 4/11/19.) There was no apportionment provided for the applicant's lumbar spine or psychological disabilities.

Based on the above, the medical impairment results in 75%, applying the AMA Guides and the combined values chart, before consideration of whether the permanent disability rating schedule has been rebutted.

PERMANENT AND TOTAL DISABILITY

According to the record as a whole, it is determined that the scheduled rating has been rebutted. The psychiatric PQME, Dr. Eerkins opined that Mr. Norwood is permanently totally disabled psychologically. (Jt. Exh. 1, deposition, p. 51- line 25-p. 52, line 4.) Dr. Eerkins further opined that 100% of the causation of his psychological disability is tied to his work injury. (Jt. Exh. 1, Dr. Eerkins deposition, p. 56, lines 18-21.) The reporting of QME Dr. Eerkins constitutes substantial medical evidence and is relied upon.

Additionally, and as a separate basis for an award of total and permanent disability, it is found the reporting of applicant's vocational expert, Scott Simon, to be more persuasive than Emily Tincher, the defense vocational expert. Based on his review of the record and comprehensive evaluation of the applicant, Mr. Simon states "it is my opinion, that although Mr. Norwood may meet the minimum skillset for employment, in the open labor market, the applicant would not be amenable to upholding even a sedentary position even within an accommodating work

environment." (App. Exh. 9, Scott Simon, M.S., December 8, 2019.) Mr. Simon opines that the applicant is unable to return to the workforce and should be considered totally disabled, i.e., not amenable to rehabilitation. (Id.) Mr. Simon's opinion on applicant's functional limitations is consistent with the entire medical record and the credibly testimony of the applicant.

NEED FOR FURTHER MEDICAL TREATMENT

Based upon the opinions of all the evaluating physicians, it is found that the applicant is in need of further medical treatment to cure or relieve the effects of his industrial injury.

PENALTY PETITION DATED SEPTEMBER 28, 2017 RE: PERMANENT DISABILITY BENEFITS

Applicant alleges that permanent disability benefits have been unreasonably delayed subsequent to the issuance of Dr. Eerkens' report in January of 2017. (App. Exh. 11.) On December 6, 2017, the defendant sent a PD notice stating that permanent disability benefits were going to resume for the period from 1/26/17-11/26/17. (App. Exh. 13.) The amount retroactively paid was based on the report dated 1/14/17 of Dr. Eerkins. (App. Exh. 13.)

It is found that the applicant's orthopedic condition not yet reaching permanent and stationary status does not abrogate the defendant's obligation to render permanent disability benefits pursuant to the psychological QME report. Any obligation to pay temporary disability had ceased pursuant to Labor Code §4656(c)(2). According to Brower v, David Jones Construction, an employer is required to pay permanent disability indemnity to an employee who may be disabled temporarily, but is not entitled to receive TD based on the statutory TD limits defined in LC §4656(c). (*Brower v. David Jones Construction* (2014) 79 CCC 550 (appeals board en banc).)

Based thereon, it is found that permanent disability benefits were unreasonably delayed and applicant's request for penalties, as set forth in the Penalty Petition dated September 28, 2017 is granted. The exact amount of the penalty including 25% of the delayed benefits and attorney fees are deferred to the parties, with WCAB jurisdiction reserved in the event of a dispute.

ATTORNEY FEES

Based on the Title 8, Cal. Code of Regs.,§ 10844 and the guidelines for awarding attorney fees found in Policy and Procedural Manual Index No. 1.140, it is found that a reasonable attorney fee is $106,633.49 as set forth in method I of the attached DEU attorney fee calculation.

ADMISSION OF DEFENDANT'S EXHIBIT C

Applicant objected to the subrosa video offered by the defendant contending that it was unauthenticated. Appropriate authentication and foundation was provided through the testimony of the investigator, Trevor Morris. As such, defendant's exhibit C, the subrosa video, is admitted into the evidentiary record.

DATE: March 23, 2021

Katie F. Boriolo
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE