

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

**JAMES STAFFORD, *Applicant***

**vs.**

**ATASCADERO STATE HOSPITAL, Legally Uninsured;  
STATE COMPENSATION INSURANCE FUND/STATE CONTRACT SERVICES,  
*Defendants***

**Adjudication Number: ADJ9668614  
San Jose District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

Defendant State of California, Department of State Hospitals Atascadero, legally uninsured, seeks reconsideration of the December 3, 2020 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found applicant, James Stafford, while employed as a stationary engineer, sustained an industrial cumulative trauma injury to his neck and bilateral upper extremities over the period August 28, 2013 through August 28, 2014, resulting in 100% permanent disability.

Defendant contests the finding that applicant is permanently totally disabled, contending that the opinion of Dr. Mays, an Agreed Medical Examiner (AME), is not substantial medical evidence to establish applicant is unable to perform any work and is totally disabled. Defendant argues that the AME is not qualified to offer an opinion on applicant's ability to perform work, that his opinion that pain precludes applicant's use of his upper extremities is not substantial evidence because it relies on applicant's subjective complaints and he found applicant can do sedentary work. Defendant further argues that Dr. Mays' opinions are improperly based on an incorrect legal standard, in that his opinion was offered in the context of finding permanent disability "in accordance with the fact," as provided in Labor Code section 4662(b), and he did not provide an adequate justification for restrictions based on subjective factors. Defendant further argues that the report of applicant's vocational expert, Mr. Diaz, is not substantial evidence to

justify finding applicant has rebutted the scheduled rating, and that applicant is entitled to a permanent disability rating of 54%.

We have received applicant'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 allegations and arguments of the Petition for Reconsideration, as well as the Answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of January 12, 2021, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Findings and Award, and deny the Petition for Reconsideration.

Additionally, we disagree with defendant's argument that the finding of permanent total disability is precluded by *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680]), because Dr. Mays' deposition testimony that applicant was unable to return to work was made in the context of Labor Code section 4662(b), "in accordance with the fact." The court in *Fitzpatrick* held that the only path to a finding of permanent total disability is through a rating obtained pursuant to Labor Code section 4660, or a rebuttal thereto, per *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]. The WCJ's finding of permanent total disability was not predicated upon the application of Labor Code section 4662(b). The WCJ determined that substantial medical and vocational evidence, from AME Dr. Mays, Dr. Feinberg and Mr. Diaz, rebutted the strict permanent disability rating derived from the AMA Guides and the PDRS, and established applicant was not amenable to vocational rehabilitation and had lost his ability to return to the labor market.

Furthermore, we disagree with defendant's assertion that the AME in orthopedics was unqualified to offer an opinion on applicant's ability to perform work in the open labor market, where his assessment is based upon his medical expertise in evaluating the real-life impact of applicant's impairments caused by his industrial injury. His opinion, considered in combination with the vocational evidence, provides substantial evidence of applicant's lack of vocational feasibility. (See *Qualcomm, Inc. v. Workers' Comp. Appeals Bd. (Brown)* (2019) 84

Cal.Comp.Cases 531 [writ denied]; *Barrett Business Services, Inc. v. Workers' Comp. Appeals Bd. (Gallagher)* (2013) 78 Cal. Comp. Cases 1318 [writ denied].)

Accordingly, we affirm the Findings and Award and deny the Petition for Reconsideration.  
For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the December 3, 2020 Findings and Award is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 22, 2021**

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

**JAMES STAFFORD  
LAW OFFICES OF BO KATZAKIAN  
STATE COMPENSATION INSURANCE FUND**

***SV/pc***

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**

Applicant, James Stafford, while employed during the period 08/28/2013 through 08/28/2014, as a stationary engineer, occupational group number 332, in Atascadero, California, by Atascadero State Hospital, sustained an injury arising out of and arising in the course of employment to the neck and bilateral upper extremities.

The Findings and Award in this case issued on 12/03/2020 and was served 12/04/2020. The Petitioner is Defendant, who has timely filed the verified Petition for Reconsideration on 12/28/2020. The Petition for Reconsideration is not legally defective. Applicant has filed an Answer.

Petitioner contends that the medical reporting of AME Mays is not substantial medical evidence, that the reporting of Dr. Rachel Feinberg [not an error, she has a doctorate and therefore properly identified as Dr. Feinberg] is not substantial evidence, and that the reporting of vocational expert Frank Diaz is not substantial evidence, and therefore it was error to award 100% total permanent disability in this case.

**II.**

**FACTS**

Applicant was employed as a stationary engineer. As part of his duties, Applicant was required to change cotter pins on conveyor belts. This required a great deal of torquing and forceful use of his bilateral upper extremities. His work required a great deal of repetitive motion and straining. As he worked at a State Hospital, there were many very heavy locked doors which required unlocking, opening and closing. Applicant filed a claim for the bilateral upper extremities and cervical spine.

To resolve this case, the parties agreed to utilize James Mays, M.D., as an Agreed Medical Examiner (AME). As an AME, the opinions of Dr. Mays are entitled to great weight.

AME Mays examined Applicant and issued multiple reports. The strict AMA rating of Dr. Mays' findings resulted in permanent disability of 54% after adjustment for age and occupation. There was no apportionment. AME Mays was also deposed by the parties. There does not appear to be any dispute as to the strict AMA rating of the reports and opinions of AME Mays.

AME Mays concluded that in order to properly assess this case, he would need a Functional Capacity Evaluation (FCE) and Physical Demands Characteristics of Work Evaluation. These evaluations were performed by Rachel Feinberg DPT [doctorate in physical therapy]. Dr. Feinberg issued reports and was deposed by the parties.

There was no finding or mention by any medical examiner or evaluator that Applicant was malingering or that his subjective complaints were not proportional to the objective findings.

Applicant was evaluated by vocational expert Frank Diaz. Mr. Diaz found Applicant to have a 100% loss of access to the open labor market. Mr. Diaz found Applicant to be precluded from competitive employment in the open labor market solely due to the diagnosis and functional limitations described by AME Mays, due to injury to the cervical spine and the bilateral upper extremities. Mr. Diaz found Applicant to not be amenable to vocational rehabilitation.

Applicant was evaluated by Ms. Jill Moeller for a vocational analysis on behalf of Defendants. Ms. Moeller found that Applicant had access to 4.38% of the open labor market, and found that Applicant was amenable to vocational rehabilitation based solely on the upper extremity work preclusions.

This Judge issued a Findings and Award and Opinion on Decision on 12/03/2020, which was served by the San Jose District Office on 12/04/2020, awarding 100% total permanent disability. Defendant has filed a timely Petition for Reconsideration and Applicant has filed an Answer to Petition for Reconsideration.

### III.

#### **LEGAL ARGUMENTS**

Defendant contends that the opinions of AME Mays are not substantial medical evidence, that AME Mays is not qualified to say Applicant is not unemployable and permanently totally disabled, that AME Mays' opinion that Applicant is unable to perform any work is not substantial medical evidence, that AME Mays did not justify his conclusion as to why Applicant is unable to work, and that the report of vocational expert Frank Diaz is not substantial evidence.

The reports and opinions of AME Mays are in full compliance with Labor Code section 4628 and Regulation 10682 [formerly Regulation 10606].

AME Mays is CLEARLY qualified to state that Applicant is totally permanently disabled. AME Mays is allowed to so opine following examination and evaluation, review of the treatment reports, review of diagnostic testing, and

based on his vast experience. AME Mays can make this determination “according to the facts” and/or as a result of the totality of the medical evidence.

AME Mays may ALSO review other evidence, such as the FCE and the reports of the vocational experts, and decide if he is in agreement with these conclusions. If vocational experts conclude that Applicant is not amenable to vocational rehabilitation and precluded from the open labor market, AME Mays may consider those opinions, incorporate those opinions, reject those opinions, or even ignore those opinions. Here, AME Mays considered the opinions and agreed that Applicant is unemployable.

There is no basis to find that the opinions of vocational expert Frank Diaz are not substantial evidence. Mr. Diaz reviewed extensive medical records, including the reports from AME Mays and the reports from Dr. Feinberg. Mr. Diaz provides the standard definition for sedentary work which includes the need to exert up to 10 pounds of force occasionally in order to lift, carry, push, pull or otherwise move objects. At page 10, Mr. Diaz indicates that the upper extremity limitations ALONE will significantly limit the labor market for Applicant. Adding in the cervical limitations, Applicant is then precluded from the open labor market.

Here, **Applicant is not in the sedentary category due to any lumbar complaints.** While the lumbar complaints were noted in the review of the medical records, lumbar complaints and limitations were NOT considered in the final determinations. There is NO evidence that any of the vocational opinions are based on any lumbar limitations.

Mr. Diaz notes at page 12 that sedentary work requires extensive use of the upper extremities but the FCE shows Applicant can only use his upper extremities repetitively for 2-7% of an 8-hour work day (less than 34 minutes per day). At page 14, Mr. Diaz indicates that the rigors of work will require Applicant to maintain a work pace appropriate to a given workload, which here, Applicant is unable to perform given the effects of his pain and discomfort. Based on the totality of the evidence, including the reports from AME Mays, the reports from Dr. Feinberg, a review of the extensive treatment reports, an exhaustive analysis of transferable skills and the open labor market, and his own vocational testing, Mr. Diaz concludes that Applicant is not amenable to vocational rehabilitation and is precluded from the open labor market. I find these opinions and conclusions to be well-supported and in fact to be substantial evidence.

It is noted that Defendant obtained their own vocational analysis in this case. Defendant’s vocational expert, Ms. Jill Moeller, indicated in her report that **the need to alternate sitting and standing was not considered in her analysis and even still she indicated that Applicant only had a 4.38% access to the open labor market.** Ms. Moeller also concluded that taking into consideration

AME Mays' final opinions on the pain which Applicant experiences in his bilateral upper extremities, then Applicant would have NO access to jobs in the open labor market.

Taken as a whole, including the AME reports, the deposition of AME Mays, the FCE and reporting of Dr. Feinberg, the deposition of Dr. Feinberg, and the findings of Mr. Diaz, which were found to be more persuasive than the opinions of Defendant's vocational expert Ms. Moeller, this Judge determined that Applicant was totally permanently disabled.

Again, it is noted that Dr. James Mays in an AGREED MEDICAL EXAMINER whose opinions are entitled to great weight. AME Mays reported numerous times, requested, received and reviewed an FCE and Work Characteristics report, and was deposed. He maintained his opinions throughout and his opinions were found to be substantial medical evidence.

Finally, Applicant has filed a thorough and very persuasive Answer to Petition for Reconsideration, which should be considered by the Board in conjunction with this Report and Recommendation on Reconsideration.

With all due respect to Defendant, the argument that there is no substantial evidence in this case is not supported by the extensive record. The Findings and Award were not in error.

#### IV.

#### **RECOMMENDATION**

The Petition for Reconsideration should be denied.

DATE: 01/12/2021  
ADORALIDA PADILLA  
WORKERS' COMPENSATION JUDGE