

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

DENNIS TEICHERA, *Applicant*

vs.

**COUNTY OF ALAMEDA, permissibly self-insured,
administered by YORK RISK SERVICES GROUP, INC., *Defendants***

**Adjudication Number: ADJ13913670
Oakland 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 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, 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 17, 2023

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

**DENNIS TEICHERA
FROST LAW
MICHAEL SULLIVAN & ASSOCIATES**

AS/cs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

- | | | |
|----|-----------------------------|---------------------------|
| 1. | Applicant's Occupation: | Deputy Sherriff |
| | Applicant's Age: | 46 years old |
| | Date of Injury: | 02/07/2018-02/08/2019 |
| | Parts of Body Injured: | Prostate Cancer |
| 2. | Identity of Petitioner: | Defendant |
| | Timeliness | The petition is timely |
| | Verification | The petition was verified |
| 3. | Date of Findings and Award: | November 30, 2022 |
| 4. | Defendant's Contentions: | |

a. Defendant contends (1) Dr. Mahawar's opinion does not support an award of permanent total disability; (2) the opinion of applicant's vocational expert, Steve Ramirez, is not substantial medical evidence; (3) that the rating of 100% for prostate cancer is not supported by the record because QME reporting and further contests the finding that Mr. Teichera is not capable of working in the open labor market (4) the board should find Mr. Teichera's permanent disability to be 83%.

II.

STATEMENT OF THE CASE AND FACTS

Applicant, Dennis Teichera, had cumulative trauma ending on February 8, 2019. Defendant submitted a stipulation with request for award of 83% permanent disability based on QME, Dr. Suresh Mahawar. An order suspending action was filed for clarification on whether applicant was totally disabled.

Applicant obtained vocational reporting from Steve Ramirez. Defendant obtained expert reporting from Emily Tincer.

On January 4, 2022, the matter was set for trial. At the first day of trial, the parties indicated they were discussing settlement and settlement was pending. The matter was continued due to productive settlement discussions. At the MSC on October 17, 2022, the

parties indicated they were unable to resolve so the matter was reset for trial on November 17th, 2022.

On November 17th, the matter proceeded to trial with Mr. Teichera testifying. The matter was then submitted.

Mr. Teichera testified that the incontinence issues began after his prostate cancer surgery. He constantly wears diapers to prevent accidents. He retired from Alameda County as a deputy sheriff and was unable to look for a job for one year. He obtained a job as a security officer but had frequent needs to go to the restroom due to his incontinence which was affecting his ability to do his job. There was a mutual parting of ways due to his incontinence.

In January 2022, his friend created a position for him at his company. He drives to sites and can pull over to go to relieve himself. He is paid a salary and does not often work more than 50 hours per week. The job is ending at the end of the year because the project will be completed.

On November 28th, defendant requested a correction of the minutes of hearing and statement of evidence. After a review of notes, amended minutes of hearing and statement of evidence was issued to indicate that Mr. Teichera did not often work more 50 hours.

On November 30th,¹ a finding and award was issued finding Mr. Teichera permanently totally disabled. It is from this finding and award that the defendant seeks reconsideration. At the time of the filing, an answer has not been received.

III

DISCUSSIONS

Any decision by the Appeals Board or a WCJ must be supported by substantial evidence. (Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; LeVesque v. Workmen's Comp. Appeals Bd. (1970) 1 Cal.3d 627,637 [35 Cal.Comp.Cases 16]; McAllister v. Workmen's Comp. Appeals Bd. (1968) 69 Cal.2d 408, 419 [33 Cal.Comp.Cases 659].) The opinion of a single physician may constitute substantial evidence, unless it is erroneous, beyond the physician's expertise, no longer germane, or based on an inadequate history, surmise, speculation, conjecture, or guess. (Braewood

¹ The Finding and Award was dated December 1, 2022; however, this was a typographical error and they were actually served on November 30, 2022. Therefore, the date of the award is November 30, 2022.

Convalescent Hospital v. Workers' Comp. Appeals Bd. (1983)_34 Cal.3d 159, 169 [48 Cal.Comp.Cases 566]; Place v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 372,378 [35 Cal.Comp.Cases 525]; see also Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc.)

Both parties agreed that the AMA guide rating was 83%. There is no dispute that rating is substantial medical evidence. The issue here is whether applicant has successfully rebutted the permanent disability rating derived from application of the AMA Guide impairment ratings by establishing that he is not able to benefit from vocational rehabilitation and is not capable of returning to the open labor market, and has therefore lost all of his earning capacity.

APPLICANT SUCCESSFULLY REBUTTED THE AMA SCHEDULE

The proper legal standard for determining whether applicant is permanently and totally disabled is whether applicant's industrial injury has resulted in applicant sustaining a complete loss of future earning capacity. (Labor Code sections 4660.1 and 4662)

A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., *Reyes v. CVS Pharmacy*, (2016) 81 Cal. Comp. Cases 388 (writ den.); see also, *Hudson v. County of San Diego*, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)

Here, it is clear based on the entirety of the record that Dr. Mahawar opined Mr. Teichera's incontinence is prevents him from returning to work.

Under the heading of permanent total disability, QME Dr. Mahawar opined:

It is my medical opinion based on a reasonable degree of probability that Mr. Teichera is permanently and totally disabled to work as a Deputy Sheriff since July 10, 2019 and is highly unlikely to return back to work as his urinary incontinence. He is unlikely to improve and he is most likely to expelience some side effects related to chemotherapy and androgen deprivation treatment. If his incontinence is improved, radiation treatment has been recommended, which, more is likely than not, results in additional

urinary incontinence. (Exhibit 103 at 46).

While there, the phrase "as a Deputy Sheriff" appears to be qualify the permanent and total analysis, the "unlikely to return back to work as his urinary incontinence" removes ambiguity that his work restrictions are that he is unable to return back to work. This is further supported under the work restrictions where Dr. Mahawar opined he cannot return to work. (Id. at 46).

The finding of total permanent disability is also based on applicant's vocational expert, Steve Ramirez. After reviewing QME Mahawar's report he opined:

In view of his involuntary urinary control, at best, he would be able to do light work or less as physical stress of the body increases his lack of urinary control. Given the frequency of the need to change to a clean, dry diaper and change clothes, he would not be considered a productive worker due to the multiple, unscheduled need for restroom breaks. Further, at best, 2-3 days a week he would have to leave work to go home, shower and clean up due to having wet on his clothes. (Exhibit I at 9)

He further opines "Mr. Teichera is presently not considered amenable for vocational services. He is not able to return to any competitive employment, in the open labor market." (Id.)

Urinary incontinence is a symptom every single day for the rest of his life, unpredictable in both the frequency and amount, and cannot leakage cannot be mitigated or prevented by setting a reminder on his phone. In order to participate in vocational training, one has to be able to sit through training. With the unpredictability of incontinence, a person cannot simply set a timer on their phone to change a diaper as Ms. Tincher suggests. The medical record supports that Mr. Teichera's condition is only going to get worse as time progresses.

Mr. Teichera's testimony that he is not currently getting active treatment for his incontinence and that he is otherwise healthy despite his terminal cancer diagnosis as mitigating or evidence that Mr. Teichera is amenable to work. However, the doctors having no active treatment means there is nothing that can be done to fix or mitigate the incontinence.

Ms. Tincher's vocational rehabilitation report is not substantial evidence nor is it convincing. Urinary incontinence is not akin to a woman having a period. A period is at most, once a month activity; whereas incontinence is all day every day, with Mr. Teichera's testimony indicating nothing can be done to alleviate it. Mr. Teichera's incontinence is described as constant with the need to use the restroom once per hour and is a symptom that he will suffer from every day for the rest of his life.

Further, Ms. Tincher's opinion that remote work is widespread now due to the pandemic is not supported with any data or information concerning how permanent the remote opportunities are. Ms. Tincher's report reiterates multiple times the motivation of filing a workers' compensation claim. However, this is an accepted prostate cancer claim. The fact is that Mr. Teichera sustained an accepted industrial injury. The motivation behind filing an appropriate claim is not relevant and appears to have tainted Ms. Tincher's opinions.

APPLICANT'S CURRENT WORK DOES NOT PREVENT A PERMANENT TOTAL
DISABILITY FINDING

There is nothing in the labor code that prohibits an employee with total disability from returning to work. An injured worker may be totally permanently disabled even if she may be able to perform some limited work in a sheltered and protected work environment. (*The Limited v. Workers' Comp. Appeals Bd.* (2012) 77 Cal.Comp.Cases 1003 (writ den.); *Garden Grove Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 75 Cal. Comp. Cases 521 (writ den.); *Sparteck Plastics v. Workers' Comp. Appeals Bd.* (1998) 64 Cal. Comp. Cases 124 (writ den.); *Pacific Greyhound Lines v. Workers' Comp. Appeals Bd.* (1973) 38 Cal. Comp. Cases 359 (writ den.)) *Escobedo v. San Luis Coastal Unified Sch. Dist.*, 2021 Cal. Wrk. Comp. P.D. LEXIS 213

Mr. Teichera's limited participation in the open labor market shows that due to the effects of his industrial injury, applicant is not capable of maintaining competitive employment in the open labor market. Mr. Teichera tried to work within in the open labor market at Lawrence Livermore Laboratory. That position was in the open labor market; however, he did not last at that position very long due to his incontinence. There was a mutual parting of ways because of the frequent unpredictable nature of his incontinence. He cannot be a guard when he needed to go to the restroom at unpredictable intervals.

Mr. Teichera's current employment was a result of a friend creating a position for him and making accommodations, However, Mr. Teichera did not have to interview, explain his incontinence, or compete against other applicants. Mr. Teichera is able to take breaks as needed, stop and even change clothes. This is a sheltered environment that is not open to every worker.

Defendant argues that Mr. Teichera's employment is not a sheltered environment. In *May*, Applicant was required to maintain his license to practice medicine, required to take 25 hours of continuing education, and provided independent judgment based on his expertise as a physician and he stayed in the same field as prior to the injury. *May v. Workers' Compensation Appeals Bd.*, 68 Cal. Comp. Cases 1232, 1234.

Here, Mr. Teichera's work consists of driving from job site to job site to oversee workers with the ability to stop as needed. Contrary to *May*, there is no evidence as to any licensing or educational requirements. There is no evidence that current employment does not require any specialized knowledge or training. Further, no testimony was given as to other job opportunities that may be available to him after this job ends.

Defendant argues that Mr. Teichera is able to use his contacts to obtain additional employment when the current employment ends; however, that is speculation and not supported by the evidence.

Defendant's arguments present a false distinction between available jobs in the labor market within applicant's restrictions and the ability to compete in the labor market. To say that a job is available for someone with applicant's restrictions is to say that there are employers willing to hire an applicant that will take unlimited breaks to use the restroom and clean himself. The evidence does not establish that there are such available jobs in the labor market. Therefore, the evidence does not satisfy defendant's burden of proving that applicant can compete in the labor market. As shown by Mr. Teichera's employment at Lawrence Livermore Laboratory, the employer was unwilling to accommodate unlimited and unpredictable restroom visitations. Unscheduled breaks for indeterminate amounts of times are not usually tolerated in the open labor markets nor is going home to shower after having an accident.

When considered in the context of the medical record, Mr. Ramirez' report and his

opinions stated therein are more persuasive than those of Emily Tincher. Based on the totality of the evidence, Mr. Teichera rebutted the presumptive AMA guides.

RECOMMENDATION

The petition for reconsideration be denied.

DATE: December 29, 2022

Erin Finnegan

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE