WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOSE MEJIA, *Applicant*

vs.

J. B. CRITCHLEY, INCORPORATED; permissibly self-insured, administered by AMERICAN CLAIMS MANAGEMENT, *Defendants*

Adjudication Number: ADJ8558358
Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously 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.

Defendant seeks reconsideration of the March 16, 2023 Findings of Fact, Award & Opinion on Decision (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a semi-truck driver/laborer on August 4, 2010, sustained industrial injury to the cervical spine, thoracic spine, lumbar spine, headaches, hearing loss, psyche, hypertension, high blood pressure, heart-left ventricular hypertrophy, chest pain, medication effects, sleep, [dysphagia], failed spine surgery, and adjacent segment disease. The WCJ found that as a result of his injuries, applicant sustained permanent and total disability without apportionment.

Defendant contends that report of applicant's vocational expert is not substantial evidence, and that the award of disability is subject to apportionment.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have also received defendant's Request for Leave to File a Supplemental Petition for Reconsideration, and a Supplemental Reply to the WCJ's Report. We accept the defendant's supplemental pleadings pursuant to WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and the supplemental pleadings, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A.

FACTS

Applicant sustained admitted injury to the cervical, thoracic, and lumbar spine, headaches, hearing loss, psyche, hypertension, high blood pressure, heart-left ventricular hypertrophy, chest pain, medication effects, sleep, [dysphagia], failed spine surgery, and adjacent segment disease while employed by defendant J. B. Critchley on August 4, 2010. Defendant admits the injury arose out of and in the course of employment, but disputes the nature and extent of the injury.

Applicant was the restrained driver of an 18-wheeler semi truck that that was involved in a two-vehicle collision that occurred while applicant was driving 40 to 50 miles per hour through an intersection. (Ex. DD, Report of Jeffrey Lundeen, M.D., March 17, 2017, p. 2.) Applicant developed neck and back pain and treated with orthopedic specialists through 2011. (*Id.* at pp. 3-4.) Applicant then consulted with spine surgeon Dr. Aryan, and on September 19, 2011, underwent a discectomy and two-level fusion of the cervical spine. (*Id.* at p. 4.) Applicant continued to have difficulty with pain and motion in his neck and back and developed difficulty with swallowing. Applicant was subsequently seen by specialists in otolaryngology, orthopedic medicine and pain medicine. (*Id.* at pp. 5-6.)

The parties have selected Jeffrey Lundeen, M.D., to act as the Agreed Medical Examiner (AME) in orthopedic medicine. Dr. Lundeen's initial report of March 7, 2017 reviewed applicant's medical history to date, as well as Dr. Lundeen's findings on clinical examination. (Ex. DD, Report of Jeffrey Lundeen, M.D., March 17, 2017, p. 37.) The AME identified industrial injury that was permanent and stationary as of March 20, 2014, and further quantified impairment for the cervical, thoracic, and lumbar spine. (*Id.* at p. 41.) For the cervical spine, Dr. Lundeen determined a Diagnosis Related Estimate (DRE) approach to be the most accurate, and rated applicant's neck condition at 28 percent whole percent impairment. (*Id.* at p. 42.) The AME also used the DRE to assess 6 percent impairment to the thoracic spine, and 8 percent impairment for the lumbar spine. Dr. Lundeen further opined that 20 percent of applicant's cervical disability resulted from preexisting degenerative conditions, and that 10 percent of applicant's thoracic and lumbar spine disability resulted from nonindustrial conditions. (*Id.* at pp. 42-43.) Dr. Lundeen restricted

applicant from heavy lifting and repetitive bending and stooping activities, repetitive flexion, extension, and rotation activities with the neck, and opined that the patient should avoid positions of prolonged flexion or extension of the neck. (*Id.* at p. 45.)

In a supplemental report of October 14, 2019, Dr. Lundeen clarified that the heavy lifting restriction precluded applicant from lifting greater than 15-20 pounds, and that applicant was limited to only occasionally performing repetitive bending and stooping and repetitive flexion, extension, and rotation activities with the neck and prolonged flexion or extension of the neck. (Ex. CC, Report of Jeffrey Lundeen, M.D., October 14, 2019, p. 2.)

The parties selected Steven McIntire, M.D., as the Qualified Medical Evaluator (QME) in neurology. In his initial evaluation of January 23, 2014, Dr. McIntire noted applicant's cervical spine fusion surgery, as well as applicant's presenting symptoms, medical history, and clinical examination. (Ex. OO, Report of Steven McIntire, M.D., January 23, 2014.) Dr. McIntire diagnosed applicant's chronic daily headaches as industrial in origin, but not effectively managed, and deferred a permanent and stationary evaluation pending further treatment. (*Id.* at p. 21.) On January 4, 2016, Dr. McIntire issued a supplemental report following review of surveillance video of applicant, assessing 2 percent impairment without apportionment to nonindustrial factors. (Ex. NN, Report of Steven McIntire, M.D., January 4, 2016, p. 2.)

The parties have also selected Geoffrey Smith, M.D., as the QME in otolaryngology. Dr. Smith issued a report of March 4, 2014 which briefly reviewed applicant's presenting history, and detailed the results of diagnostic testing performed in relation to applicant's complaints of difficulty in swallowing and hearing loss. (Ex. QQ, Report of Geoffrey Smith, M.D., March 4, 2014, p. 5.) Dr. Smith declared applicant to be permanent and stationary, and diagnosed damage to the right superior laryngeal nerve as a consequence of his cervical spine surgery, and mild to moderate hearing loss. (*Id.* at p. 6.) The QME assessed one percent whole person impairment for binaural hearing loss, without apportionment, and zero percent impairment for difficulty with vocal hoarseness and choking.

The parties have also selected James House, Ph.D., as the QME in psychology. Dr. House's first report of February 28, 2014, reviewed applicant's vocational and medical histories, and further detailed the results of a mental status examination. (Ex. MM, Report of James House, Ph.D., February 28, 2014, p. 31.) Following a discussion of applicant's presenting symptoms, Dr. House diagnosed a mood disorder due to a medical and orthopedic condition, as well as major

depressive disorder, with a corresponding Global Assessment of Functioning (GAF) score of 52. (*Id.* at p. 33.) Dr. House noted applicant's activities of daily living were moderately impaired, and accompanied by moderate sleep disturbance and difficulty in social functioning. (*Id.* at p. 34.) Applicant further sustained mild to moderate impairment in the areas of concentration, persistence and pace, as well as moderate impairment of his adaptability. (*Ibid.*) Dr. House determined applicant had not yet reached a permanent and stationary status and deferred final opinions pending additional treatment.

Dr. House reevaluated applicant on February 11, 2016, noting that applicant's evaluation actually commenced on December 23, 2015, but that applicant's increasing agitation and acute pain in the spine resulted in the termination of the appointment after one hour and fifteen minutes. Following the completion of a rescheduled evaluation, Dr. House reviewed additional medical records, and again diagnosed a mood disorder, coupled with a depressive disorder and a "rule out" diagnosis of Major Depressive Disorder with moderate to severe degree of severity. (*Id.* at p. 26.) Applicant's GAF score remained at 52. However, applicant's functional impairment in his activities of daily living was now assessed as moderate, with applicant only minimally able to participate in household chores and displaying significant dependence on his family to assist him with day-to-day activities. (*Id.* at p. 27.) Applicant's social functioning impairment was also increased to moderate impairment. Dr. House noted that due to difficulty with focus, concentration and memory, additional psychometric testing was not possible, although "during both evaluations, [applicant] exhibited a moderate degree of psychomotor retardation." (*Id.* at p. 28.) Once again, applicant was not yet deemed to have reached a permanent and stationary status, requiring additional psychiatric treatment to address his "continued depression, anxiety and cognitive impairments," and for other treatment considerations. (*Id.* at p. 29.)

QME Dr. House reevaluated applicant on November 11, 2017, and deemed applicant to have reached a permanent and stationary plateau. Dr. House reiterated his prior diagnosis of a mood disorder, coupled with a Major Depressive Disorder, and a corresponding GAF score at 52. Dr. House again affirmed his prior opinion that applicant sustained moderate impairment in activities of daily living and social functioning, as reflected in his concentration, persistence and pace, and in his deterioration or decompensation in complex or work-like settings. (Ex. KK, Report of James House, Ph.D., November 11, 2017, p. 20.) Causation was noted to be industrial, and Dr. House found no basis for nonindustrial apportionment. (*Id.* at p. 21.)

The parties have also selected Raman Verma, M.D. as the QME in internal medicine. Dr. Verma's initial evaluation on October 18, 2017 noted varying levels of compromise with respect to applicant's activities of daily living, including severe interference with physical activities. (Ex. JJ, Report of Raman Verma, M.D., October 18, 2017, p. 4.) The report reflects a review of applicant's medical record, as well as the results of Dr. Verma's clinical examination. Dr. Verma thereafter diagnosed hypertension, sleep disturbance and sexual impairment, but deferred additional findings pending further diagnostic testing. (*Id.* at p. 64.) Dr. Verma reevaluated applicant on June 6, 2018, and reviewed applicant's interim medical reporting. Dr. Verma noted left ventricular hypertrophy and assessed 30 percent impairment for applicant's stage 3 asymptomatic hypertension, and 9 percent impairment for reduced daytime alertness due to lack of sleep. (Ex. II, Report of Raman Verma, M.D., June 22, 2018, p. 17.) The QME noted that applicant should "limit activities involving standing, walking, sitting, climbing, forward bending, kneeling, crawling, twisting, keyboarding, grasping, pushing and pulling to no more than 1-2 hours a day," but that applicant would not have restrictions for going back to work "after his blood pressure is controlled." (*Ibid.*) The QME also disclaimed nonindustrial apportionment.

A supplemental report of June 14, 2022 noted the advent of diastolic dysfunction as reflected in a July 29, 2021 echocardiogram, but no change in impairment. (Ex. FF, Report of Raman Varma, M.D., June 14, 2022, p. 1.)

Applicant has also sought treatment with primary treating physician Sanjay Chauhan, M.D., whose February 16, 2018 report notes that applicant's cervical spine fusion surgery "did not help much," and that post-surgery, applicant continued to experience dysphagia, persistent pain radiating to the upper extremities, a sleep disorder, depression, anxiety and medication-related episodes where the patient had a GI bleed which required evaluation and emergency room visit. (Ex. 25, Report of Sanjay Chauhan, M.D., February 16, 2018, p. 2.) Dr. Chauhan's report reviewed the submitted medical record, and noted that applicant has not worked since September, 2011, and that applicant stopped working about 4-5 months post-injury, and had not worked since then. (*Id.* at p. 6.) Dr. Chauhan deemed applicant to have reached maximum medical improvement as of February 15, 2018, and ascribed medical causation to the August 4, 2010 industrial injury. Dr. Chauhan diagnosed failed cervical spine surgery with fusion and residual chronic pain, bilateral cervical radiculopathy, bilateral lumbar radiculopathy, thoracic spine pain, dysphagia, insomnia, depression and anxiety, and gastroesophageal reflux disorder. With respect to

apportionment, the PTP disclaimed nonindustrial apportionment. (*Id.* at p. 9.) With respect to vocational rehabilitation, Dr. Chauhan opined that it was "unlikely that [applicant] can returned to any gainful employment for practical purposes[,] it appears the patient it permanently totally disabled." (*Ibid.*) With respect to work disability, Dr. Chauhan further opined that, "the patient is currently permanently totally disabled on psych ground as well as orthopedic ground[s]," and that applicant was "unable to return to any gainful employment because of significant subjective and objective findings." (*Id.* at p. 10.)

Applicant has retained vocational expert P. Steve Ramirez, who issued an initial "Vocational Feasibility Report" that reflects a teleconference meeting with applicant and a review of applicant's medical history. (Ex. 10, Report of P. Steven Ramirez, May 12, 2021, p. 3.) Mr. Ramirez summarized the submitted medical and medical-legal reporting, including Dr. McIntire in neurology, Dr. House in psychology, Dr. Smith in otolaryngology, Dr. Verma in internal medicine, and AME Dr. Lundeen in orthopedic medicine. (*Id.* at pp. 5-14.) Using the work restrictions identified in the medical record, Mr. Ramirez analyzed applicant's transferable job skills, finding "0 [zero] matches out of 12,741 DOT titles for light and sedentary occupation which were considered physically appropriate and with commonality of worker traits." (*Id.* at p. 15.) Mr. Ramirez further opined that applicant "is not considered to be amenable for performing competitive work tasks with the work restrictions documented by Dr. Verma, Dr. Lundeen and Dr. House." (*Ibid.*)

Following a review of the reporting of applicant's PTP Dr. Chauhan, Mr. Ramirez issued supplemental reporting dated May 27, 2021 in which he reiterated his prior conclusions, again finding that "Mr. Mejia is not considered amenable for vocational services." (Ex. 9, Report of P. Steven Ramirez, May 27, 2021, p. 3.)

Defendant retained vocational expert Scott Simon, whose report of November 8, 2021 begins by observing that the analysis "is based on a review of the [submitted] records on a standalone basis," and that if "further refinement of my opinion is needed, a personal interview and testing session would be recommended." (Ex. A, Report of Scott Simon, November 8, 2021, p. 1.) Mr. Simon reviewed applicant's medical history, including the opinions of the AME and the QMEs, their impairment ratings, apportionment, and work restrictions. (*Id.* at p. 2.) Mr. Simon then discussed a transferable skills assessment, noting that prior to the injury, applicant performed work up to the "Medium Work" physical exertional level. (*Id.* at p. 10.) The report noted that "due

to preexisting nonindustrial factors, limited education and language limitations, this applicant had maximal access to only 5% of the overall labor market prior to this current industrial injury." (*Id.* at p. 19.) The report also reviewed the various factors that are relevant to earning capacity, as described in *Argonaut Ins. Co. v. Indust. Acc. Commn.* (*Montana*) (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130]. (*Id.* at p. 24.) Following this analysis, Mr. Simon concluded that applicant was amenable to vocational rehabilitation and had sustained a 37% loss of future earning capacity, prior to applicable apportionment. (*Id.* at p. 28.)

Primary Treating Physician Dr. Chauhan authored a supplemental report of October 15, 2022, following a review of the reporting of applicant's vocational expert Mr. Ramirez as well as defendant's vocational expert Mr. Simon. Dr. Chauhan reiterated his conclusion that "the patient is unable to sustain any competitive work given orthopedic, neurologic and psychological and internal medicine issues." (Ex. 12, Report of Sanjay Chauhan, October 15, 2022 (served November 7, 2022), p. 4.) Dr. Chauhan noted that applicant was effectively limited to standing no more than five minutes per hour, walking at ten minutes per hour, from lifting greater than five pounds, and that "it is reasonably medically probable that the patient will need to lie down or recline from his work activities…about 10-15 minutes each hour." (*Id.* at p. 6.) Dr. Chauhan further noted his specific agreement with applicant's vocational expert, that applicant had lost 100 percent capacity to compete in the open labor market, and his disagreement with the assertion of defendant's vocational expert that applicant was capable of reentering the labor market. *(Ibid.)*

The parties proceeded to trial on December 28, 2022, and framed multiple issues include permanent disability and apportionment.[1] (Minutes of Hearing and Summary of Evidence, December 28, 2022, p. 3:1.) The sole witness at trial was applicant's son, Antonio, who testified to living for the past 12 years with his father, mother, and brother. (*Id.* at 8:18.) Antonio testified that following his father's neck surgery in 2011, applicant was "not doing well," and that applicant had problems with swallowing and getting food down. (*Id.* at 8:24.) Applicant experienced difficulty with mobility and with lifting things, and often required help in getting up from bed or from the couch. Antonio testified that his father was in pain all the time, that he cannot bend over,

[1] We observe that the evidentiary record in this matter contains both consultative ratings and copies of appellate decisions being offered as case law authority. We remind the parties that pursuant to Division of Workers' Compensation (DWC) Rule 10166(b), Consultative Rating Determinations are not admissible in judicial proceedings. We further recommend that parties wishing to bring various cases to the court's attention file a trial brief with the relevant citations or request judicial notice of the case citations pursuant to Evidence Code sections 451 and 452.

and that he suffers from depression and is emotionally labile and often irritable and difficult to be around. (*Id.* at 9:9.) Antonio described his father's difficulty in focus, daily use of multiple medications, and accompanying nausea, dizziness, sleepiness and emotional unpredictability. Antonio also testified that his father needs a family member to accompany him if he leaves the house, and that applicant cannot sit for long periods of time. (*Id.* at 10:2.)

The WCJ issued his F&A on March 16, 2023, finding applicant had sustained permanent and total disability. (F&A, Finding of Fact No. 2.) The WCJ based his decision on the aggregate medical and vocational reporting in the evidentiary record, including the reporting of AME Dr. Lundeen, QME Dr. Smith, QME Dr. McIntire, QME Dr. Verma, QME Dr. House, and on applicant's vocational expert Mr. Ramirez. (*Ibid.*) The WCJ's Opinion on Decision reviewed the AME and QME reporting, and the whole person impairment described by each physician. (Opinion on Decision, pp. 9-10.) The WCJ further found the opinions of Mr. Ramirez finding applicant not feasible for vocational rehabilitation to be persuasive. The WCJ further opined that the aggregate medical-legal record and the vocational evidence were further bolstered by the credible and unrebutted testimony of applicant's son, whose testimony further substantiated the assertion of applicant's permanent and total disability. Finally, the WCJ noted that the opinions of applicant's treating physician Dr. Chauhan were also supportive of the determination of a total loss of earning capacity in the open labor market. (Opinion on Decision, at pp. 11-12.)

DISCUSSION

Labor Code[2] 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), as applied by the Permanent Disability Rating Schedule (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 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals

[2] All further references are to the Labor Code unless otherwise noted.

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].)

The issue presented herein is whether the medical and vocational evidence constitutes substantial evidence to support the conclusion that applicant is permanently and totally disabled due to applicant's inability to benefit from vocational rehabilitation. Defendant contends the WCJ relied primarily on the opinions of Mr. Ramirez, and that the opinions of Mr. Ramirez are improperly based on medical impairment, rather than on work restrictions. (Petition, at p. 5:11-13; 6:1.) Defendant further contends that the finding of permanent and total disability should reflect the apportionment identified by Agreed Medical Examiner Dr. Lundeen. (*Id.* at 10:6.)

However, the Findings of Fact make clear that the WCJ's analysis was predicated on the record as a whole, including the comprehensive body of medical-legal reporting, the opinions of the primary treating physician, and the trial testimony, in addition to those opinions expressed by applicant's vocational expert. Following our independent review of the record we agree with the WCJ's assessment that notwithstanding the apportionment identified by the orthopedic AME, due consideration of applicant's psychiatric, internal medicine, and neurologic disabilities, coupled with the persuasive reporting of the primary treating physician and the credible testimony of the sole witness at trial support a conclusion that applicant has sustained permanent and total disability arising solely out of industrial factors. (*Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman*) (2013) 218 Cal.App.4th 1137, 1142 [78 Cal. Comp. Cases 751].)

The WCJ's review and reliance on the entire record is reflected in his Findings of Fact. Finding of Fact No. 2 finds applicant to be permanently and totally disabled and offers specific references to the AME and QME reporting in evidence. Finding of Fact No. 2(a) cites to the reporting of AME Dr. Lundeen, who describes industrial injury with impairment to applicant's cervical, thoracic and lumbar spine. (Ex. DD, Report of Jeffrey Lundeen, M.D., March 17, 2017, p. 41.) Dr. Lundeen further restricted applicant from heavy lifting and repetitive bending and stooping activities, repetitive flexion, extension, and rotation activities with the neck, and further restricted prolonged flexion or extension of the neck. (*Id.* at p. 45.)

Finding of Fact No. 2(d) references the reporting of internal medicine QME Dr. Verma, who diagnosed applicant with hypertension, sleep disturbance and sexual impairment, and whose reporting documented varying levels of compromise with respect to various facets of applicant's activities of daily living, including severe interference with physical activities. (Ex. JJ, Report of

Raman Verma, M.D., October 18, 2017, p. 4.) In addition to a diagnosis of left ventricular hypertrophy, Dr. Verma has also identified impairment based on reduced daytime alertness due to lack of sleep. (Ex. II, Report of Raman Verma, M.D., June 22, 2018, p. 17.)

Finding of Fact No. 2(e) further reflects the reporting of psychology QME Dr. House, who described a clinical diagnosis of Mood Disorder, coupled with a Major Depressive Disorder, and a corresponding GAF score at 52. Dr. House described pervasive compromise in applicant's activities of daily living, social functioning, concentration, persistence, and pace, and in the applicant's deterioration or decompensation in complex or work-like settings. (Ex. KK, Report of James House, Ph.D., November 11, 2017, p. 20.) With regard to applicant's activities of daily living, the QME observes:

> Mr. Mejia reports that he can attend to his hygiene and grooming, but finds sometimes putting on his clothes, particularly his pants or when putting shoes on can be a challenging for him and he occasionally requires assistance. He reports that he can only walk and stand for short periods of time. Mr. Mejia shared that he experiences a notable degree of difficulty with ascending and descending steps. He also reports having difficulties with sitting for prolonged periods of time. He also reports a notable decrease in his strength and mobility. He indicated that he has continued difficulties with kneeling, bending and squatting. He shared that his sleep is frequently disturbed due to the positional pain that he experiences. He reports that he is dependent on his family in completing most household activities such as shopping and yard maintenance. He is able to drive short distances and is reportedly dependent on his family members to take him to his various appointments. He also reports that due to his persistent pain and discomfort that he has some notable difficulties with memory and concentration, focus, and that he is frequently forgetful.
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> (Ex. LL, Report of James House, Ph.D., February 22, 2016, p. 5.)

Finding of Fact No. 2(c) further references Dr. McIntire's reporting in neurology (headaches), which identifies industrial causation and modest impairment.

Thus, the WCJ has appropriately surveyed the medical-legal reporting and made specific citation to the findings of the various reporting AME and QMEs which document applicant's disability across a broad spectrum of specialties. Standing alone, the record of the medical-legal evaluations establishes significant disability, subject to orthopedic apportionment.

However, the scheduled rating is not absolute. (*Fitzpatrick, supra,* 27 Cal.App.5th 607, 619-620.) A rating obtained pursuant to the PDRS may be rebutted by showing applicant's diminished future earning capacity is greater than the 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].) In analyzing the issue of whether and how the PDRS could be rebutted, the Court of Appeal has also observed:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id.* at pp. 237–238.) Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating."
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> (*Ogilvie, supra*, at p. 1274.)

Thus, "an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating." (*Ogilvie, supra,* at p. 1277.)

"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." (*Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*)*, supra,* 240 Cal.App.4th 746.)

Here, Mr. Ramirez's report observes that applicant's work injuries effectively preclude vocational retraining, and by extension, preclude him from reentry into the competitive labor market:

> When considering the orthopedic restrictions, there are no full-time jobs identified within the unskilled light and sedentary occupations Mr. Mejia

> physically could perform. When adding the psychiatric impairments, his inability to work at an appropriate, expected work pace for an unskilled job, day in and day out, will result in his inability to keep a job. On the basis of all of Mr. Mejia's work restrictions and his vocational profile, he is not considered amenable for vocational services. Therefore, Mr. Mejia is not presently able to return to any competitive employment, as the job is normally performed, in the open labor and keep a job. He has a 100% diminished ability to return to the open labor, has lost 100% of his access to the open labor market and is 100% vocationally disabled.
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> (Ex. 10, Report of P. Steven Ramirez, May 12, 2021, p. 17.)

The WCJ thus concludes that the medical-legal reporting, "when coupled with the vocational feasibility opinion, demonstrate that applicant is totally and permanently disabled." (Finding of Fact No. 2(g).)

In addition to the medical-legal and vocational reporting, the Opinion on Decision discusses additional salient and contributing factors used in the determination of permanent and total disability, including the opinions of applicant's primary treating physician and the credible testimony of the sole witness at trial.

Acting in his capacity as primary treating physician, Dr. Chauhan has indicated as early as 2018 that it was "unlikely that [applicant] can returned to any gainful employment for practical purposes," and that it appears the patient it permanently totally disabled. (Ex. 25, Report of Sanjay Chauhan, M.D., February 16, 2018, p. 9.) With respect to work disability, Dr. Chauhan further opined that, "the patient is currently permanently totally disabled on psych ground as well as orthopedic ground[s]," and that applicant was "unable to return to any gainful employment because of significant subjective and objective findings." (*Id.* at p. 10.) Following a review of the reports of both applicant's and defendant's vocational experts, Dr. Chauhan opined:

> In my opinion the patient is unable to sustain any competitive work given orthopedic, neurologic and psychological and internal medicine issues. As noted earlier, his standing limitation is only 5 minutes per hour. In my opinion he is unable to sustain competitive work. The patient can walk up to 10 minutes per hour, unable to sustain competitive work. The patient can drive short distance of 5-15 minutes and is unable to sustain competitive work. Lifting is limited to 5 pounds, once per hour i.e., rarely … given the patient's subjective complaints, in my opinion the patient will not be able to remain on task more than 2 hours per day … based on activities of daily living, the patient in my opinion has about 90% loss of lumbar spine use.

> (Ex. 12, Report of Sanjay Chauhan, October 15, 2022 (served November 7, 2022), p. 4.)

Dr. Chauhan further observed that applicant would not be able to remain "on task" in a work environment for more than two hours per day. (*Ibid.*) In addition, the side effects of applicant's prescribed medications and intermittent use of a cane and a walker during lumbar spine flare-ups would further preclude applicant's ability to tolerate a 40 hour work week. (*Id.* at p. 5.) Thus, Dr. Chauhan affirmed his opinion that applicant was not feasible for vocational retraining, or capable of reentering the competitive labor market. (*Id.* at p. 6.)

Defendant's Petition contends that the conclusions reached by the Primary Treating Physician were "speculative and clearly outside the scope of the doctor's expertise." (Petition, at 7:6.) However, as we recently noted in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894, 902 [2023 Cal. Wrk. Comp. LEXIS 46] (Appeals Bd. en banc), the Labor Code repeatedly provides that evaluating physicians must address all relevant issues as comprehensively as possible. ((See Lab. Code, §§ 139.2, 4061, 4062.3(j), 4064(a), 4628(c), 4663(b); see also Cal. Code Regs., tit. 8, § 10683.) In addition, our Rules routinely require the primary treating physician to opine on vocational issues including return to work considerations, such as changes in work restrictions or modifications, and a determination of whether an injured worker is capable of a return to normal work or is otherwise a candidate for vocational retraining. (See, e.g., Cal. Code Regs., tit. 8, §§ 9785; 10133.36; 10682.) Accordingly, we find defendant's argument unpersuasive because "vocational evidence is an important, and often integral, consideration in the preparation of medical-legal reporting, and that is fully within the purview of the evaluating physician to offer an opinion responsive to the vocational evidence either at the request of the parties, or of the physician's own accord." (*Id.* at p. 902.)

In addition to the medical-legal reporting, the vocational expert reporting, and the opinions of applicant's primary treating physician, the WCJ's Opinion on Decision also acknowledges the persuasive testimony of applicant's son:

> To further corroborate, the VE reporting of P. Steve Ramirez, the only witness called at trial was Antonio De Jesus Mejia Casada, applicant son. This witness described his father's accident and stated that his father had broken his neck as a result of that accident. He described the subsequent surgery that was performed on/or about 9/20/2011 and applicant's subsequent daily routines and activities of daily living and their limitations. This witness also described the effects of all the medication that the applicant takes. This witness noted that applicant rarely

> leaves home and is very antisocial. When he does leaves home, the Applicant always has a family member with him as he cannot drive and cannot hold down a job because of his limitations physically.
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> (Opinion on Decision, p. 11.)

The WCJ thus observes that the unrebutted testimony of the sole witness at trial further substantiated the clinical observations of the evaluating physicians, as well as the conclusions reached by applicant's primary treating physician and vocational expert, that applicant is not feasible for vocational retraining and has lost all earning capacity. (*Ibid.*)

Based on the foregoing, we do not agree that the WCJ primarily relied upon the reporting of applicant's vocational expert. (Petition, at 6:1.) Rather, the WCJ based his determinations on a review of the entire record, including the vocational evidence, the medical-legal reporting, the findings of the primary treating physician, and the persuasive testimony of the sole witness at trial.

Nor are we persuaded that the WCJ erred in entering an unapportioned award. The sole source of nonindustrial apportionment in the record was the apportionment attributed to degenerative changes in the spinal column identified by the orthopedic AME. However, the F&A clearly reflects consideration of factors of disability in the record that extend beyond applicant's orthopedic injuries. And in this regard, the record reflects no other nonindustrial apportionment identified by any other medical-legal evaluator. The WCJ explicitly premises his determination of unapportioned disability on not only the orthopedic factors, but applicant's psychiatric, internal medicine and neurological injuries, as confirmed in the reporting of the primary treating physician and unrebutted witness testimony at trial. We therefore concur with the WCJ's assessment that the factors of disability, including that arising out of applicant's psychiatric, internal medicine, and neurologic impairments, when combined with applicant's orthopedic impairment after apportionment, collectively constitute substantial evidence of permanent and total disability.

We thus conclude that the WCJ properly assessed the entire record, applied the law, and exercised his judgment in finding that applicant's injuries resulted in permanent and total disability. When a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Appeals Board and rejected only on the basis of contrary evidence of considerable substantiality. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54

Cal.Comp.Cases 349].) Following our independent review of the record occasioned by defendant's Petition, we discern no such evidence of considerable substantiality. We affirm the F&A, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Award & Opinion on Decision, issued on March 16, 2023 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 9, 2023

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

JOSE MEJIA
VALDEZ & VALDEZ
BRADFORD & BARTHEL

SAR/abs

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