WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DEBRA ELLIS, ***Applicant***

vs.

UNIVERSITY OF CALIFORNIA SANTA CRUZ, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, ***Defendants***

Adjudication Number: ADJ9535221

San Jose District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on June 16, 2023, wherein the WCJ found in pertinent part that as a result of her October 1, 2011, industrial injury, applicant is permanently totally (100%) disabled.

Defendant contends that applicant's optometry, hearing loss, and cognitive/peripheral neuropathy impairment factors should not be added but should be combined pursuant to the permanent disability rating schedule (PDRS) Combined Values Chart and that a significant amount of applicant's disability should be apportioned to non-industrial factors.

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

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration

BACKGROUND

Applicant claimed injury to her head, eyes, hearing, psyche, neurological system, and to her right shoulder, right arm, and right hip on October 1, 2011, while employed by defendant as a residential education coordinator.[1]

Applicant has had an extensive course of medical treatment (see e.g., Joint Exh. AA, Massoud Mahmoudi D.O., May 7, 2015, pp. 7 – 40, record review; App. Exh. 10, Stephen E. Francis, Ph.D., November 21, 2019, pp. 24 – 98, record review); the medical record relevant to the issues addressed herein is summarized as follows:

Applicant was initially evaluated by internal medicine qualified medical examiner (QME) Massoud Mahmoudi D.O., on April 8, 2015. (Joint Exh. AA, Dr. Mahmoudi, May 7, 2015.) Dr. Mahmoudi examined applicant, took a history, reviewed the medical record, and determined that applicant's condition was not permanent and stationary. (Joint Exh. AA, p. 45.) The doctor re-evaluated applicant on July 13, 2016, and submitted several supplemental reports. (See Joint Exhs. BB – FF.) In response to a question from applicant's counsel, in his December 19, 2020, report, Dr. Mahmoudi stated:

> Musculoskeletal, gastrointestinal (dysphagia), eyes pathology, ear pathology (hearing loss), and psyche are all different; i.e., they all have a different anatomy and function. There is no overlapping of each system with another. There is also a synergy when you add the impairments. For example, in this case, the claimant has hearing loss; this limits her in doing her regular duties. However, when you add the visual complaint, then two organ systems have been affected. Adding hearing loss to the visual dysfunction has increased the whole person impairment as the claimant is in loss of two [sic] organ systems. As far as psyche, the sensorineural loss should be added to psyche and GI condition by simple addition and not by the combined values chart (CVC). ¶ First, because there is no overlapping and second, there is a synergy of all the noted conditions. In summary, the most accurate way of adding impairments is by simple addition as opposed [sic] to use of the CVC.
> (App. Exh. 2, Massoud Mahmoudi D.O., December 19, 2020, p. 38.)

[1] Originally plead as a cumulative injury during the period from August 1, 2006, through August 1, 2013, the Application for Adjudication of Claim (Application) was first amended to have an end date of February 28, 2013; in August 2016, the Application was again amended to claim a specific injury on October 1, 2011.

On October 7 and 8, 2019, neuropsychology QME Stephen E. Francis, Ph.D., evaluated applicant. Dr. Francis took a history, reviewed the extensive medical record, and conducted psychological and neuropsychological tests. Regarding his rating of applicant's whole person impairment, Dr. Francis stated:

> There is a rationale for Kite and that is Dr. Gravina gave a 12% rating and my 51% rating are two aspects of the same organ system.[2] The sensory system forms the most basic unit of central nervous system via input to the thalamus and disruption to the system results in higher cognitive and emotional functions being impacted by the damage to the sensory system. This is analogous to the Kite case, specifically the injury to the bilateral hips, warranted an addition rather than use of the compressive values chart. The combined [sic] values chart would provide a strict rating of 57%, rating per Kite would be a 63%.
> (App. Exh. 10, Dr. Francis, November 21, 2019, p. 113.)

The parties proceeded to trial on May 18, 2023.The issues submitted for decision included parts of body injured and permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 18, 2023, p. 3.) The issue of injury arising out of and occurring in the course of employment (AOE/COE) was previously tried.[3]

DISCUSSION

As explained in the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides):

> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (e.g., blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. States also use different techniques when combining impairments. Many workers' compensation statutes contain provisions that combine impairments to produce a summary rating that is more than additive. Other options are to combine (add, subtract, or multiply) multiple impairments based upon the extent to which they affect an individual's ability to perform activities of daily living.
> (AMA Guides, p. 10.)

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[2] The doctor's reference to "Kite" pertains to the Appeals Board decision (writ denied) affirming the WCJ's opinion that the injured worker's factors of disability should be added, not combined. (*Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ den.).)

[3] The WCJ found that the tick bite resulting in a *Borrelia Hermsii* bacterial infection was an injury AOE/COE. (See Findings and Order, April 25, 2017.)

It is well established that the overarching goal of rating an injured worker's permanent disability is to achieve accuracy as to the level of disability caused by an industrial injury. (*Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084, 2009 Cal.Wrk.Comp. LEXIS 219 (Appeals 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 [115 Cal. Rptr. 3d 112, 75 Cal.Comp.Cases 837].)

Further, the 2005 permanent disability rating schedule (PDRS) states that impairments and disabilities are "generally combined" using the formula, a + b(1-a), from which the CVC is derived. (PDRS, p. 1 – 10.) As noted above, "A scientific formula has not been established to indicate the best way to combine multiple impairments." (AMA Guides, p. 10.)

It has long been recognized that a rating schedule like PDRS is only a guide and adding the level of permanent disability caused by an injury to separate body parts is proper to determine the overall level of permanent disability when that results in a more accurate rating than using the CVC to combine them. (*Mihesuah v. Workers' Comp. Appeals Bd*. (1976) 55 Cal.App.3d 720, 728 [41 Cal.Comp.Cases 81] [schedule "is only a 'guide' to be employed" and the final rating should reflect "the entire picture of disability and possibility of employability"]; *Abril v. Workers' Comp. Appeals Bd*. (1976) 55 Cal.App.3d 480 [40 Cal.Comp.Cases 804].) Thus, blind adherence to the CVC is improper where a less accurate disability rating results.

Having reviewed the trial record, we agree with the WCJ that the reports from Dr. Mahmoudi and Dr. Francis are substantial evidence that adding the factors of applicant's disability results in an accurate rating of his disability. In turn, we agree with the WCJ's conclusion that applicant is permanently totally (100%) disabled.

Regarding the issue of apportionment:

> Defendants acknowledge that apportionment is currently applied prior to the impairments being combined. However, when the difference between utilizing the CVC versus adding the impairments would result in partial permanent disability or permanent total disability respectively, the addition of impairments is inherently unfair as it quashes Defendant's well established right to apportionment. <u>Defendants acknowledge that this is a somewhat novel argument that is yet to be specifically addressed by caselaw</u>.
> (Petition, p. 15, underlining added.)

As the WCJ explained in his Report, "Based upon this evidence, I found the Applicant totally disabled after apportionment was deducted. In doing so, I accepted the rating strings proposed by the parties, which were nearly identical, and which were entirely identical with respect to apportionment." (Report, p. 2.) Clearly, when rating each factor of applicant's disability, the WCJ included the apportionment identified by the reporting physicians. He then determined that the ratings should be added, not combined, and based thereon he concluded that applicant was permanently totally disabled. We agree with the WCJ that defendant's argument, "… has nothing to do with the facts or the law but rather a request that the WCAB use this opportunity to overhaul the entire system by which PD is awarded." Therefore, we see no legal or factual basis for disturbing the WCJ's conclusion that applicant is permanently totally (100%) disabled.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on June 16, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ NATALIE PALUGYAI, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 30, 2023

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

DEBRA ELLIS
BORAH & SHAFFER
LAUGHLIN, FALBO, LEVY & MORESI

TLH/mc

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

REPORT AND RECOMMENDATION
ON
PETITION FOR RECONSIDERATION

I

INTRODUCTION

1. Applicant, Debra Ellis, while employed on 10/1/2011 as a residential educator, at Santa Cruz, California by UC Santa Cruz, permissibly self-insured for worker's compensation liability, sustained an injury arising out of and in the course of this employment stemming from an infection transmitted by the bite of a tick, which has affected the Applicant's neurological systems, head, eyes, psyche, hearing, right shoulder, right arm, and right hip.

2. A Petition for Reconsideration has been filed by the Defendant. The Petition was timely filed. An Answer has been filed on 7/10/2023.

3. Defendant seeks Reconsideration from a Findings and Award, which issued 6/15/2023, which found that Applicant was permanently and totally disabled

4. Defendant seeks Reconsideration based upon the contentions that (1) the medical evidence justifying application of *Kite* is not substantial; and (2) The *Kite* decision should be overturned based upon *dicta* in *Fitzpatrick*; and (3) an award of total disability denies Defendant the right to apportionment.

II

SUMMARY of FACT

Very few of the factual disputes raised at trial remain in dispute upon Reconsideration. The primary disputes concern Defendant's request for a substantial change in well-established precedent. Accordingly, this Summary may be brief.

> The only remaining factual dispute concerns Defendant's claim that Dr. Mahmoudi's conclusion (that some of Applicant's impairments should be added together instead of combined using the CVC, as permitted in the Kite decision and its numerous progeny) does not constitute substantial evidence. Interestingly, AME Stephen Francis (Exhibits 1 and 10) also supports addition of certain factors of PD instead of combination under the CVC. Defendant appears to concede that this report is substantial evidence and supports addition under *Kite*, assuming that *Kite* remains good law.

At pages 3-4 of the Petition for Reconsideration, Defendant sets forth an accurate, if perhaps slightly selective, summary of the portions of Dr. Mahmoudi's reports and deposition, which addressed the *Kite* issue. These portions are nearly identical to those portions set forth in the Opinion and Decision. I relied primarily upon on Exhibit 2, page 38; Exhibit D, page 16; page 19 line 15 to page 29 line14; and page 20, line 14 through page 22 line 3. Dr. Mahmoudi states, in the face of skillful and vigorous cross-examination, that no overlap existed between the optometry, hearing loss, and cognitive/peripheral neuropathy factors of disability. Dr. Mahmoudi went on to state that addition produced a more accurate rating than combination, because the compressive effect of the CVC produces an unrealistic effect. He based this conclusion upon his observation that the overall effect of these impairments was synergistic and not duplicative, because one loss of function would make any attempt to compensate for the others impossible.

Based upon this evidence, I found the Applicant totally disabled after apportionment was deducted. In doing so, I accepted the rating strings proposed by the parties, which were nearly identical, and which were entirely identical with respect to apportionment.

From this Award, Defendant seeks Reconsideration.

III

DISCUSSION

Defendant first argues that the report and deposition of Dr. Mahmoudi, which support addition in place of application of the CVC, are not sufficient to constitute substantial evidence. First, Defendant points out that only two of the six evaluators in the case support addition in place of the CVC. This is true, but not particularly material to the discussion. As far as I am aware, neither party ever asked the other examiners their opinion on addition versus combination. Certainly none of them expressed an opinion. Absence of evidence is not evidence of absence. If anything, this lack of other opinions merely renders the opinions of Dr. Francis and Dr. Mahmoudi unrebutted on the existing record. While this is not dispositive, it certainly does nothing to rebut the opinions expressed in favor of a *Kite* approach. In fairness to Defendant, the Petition spends virtually no effort rebutting the opinion of Dr. Francis and appears to accept that opinion as substantial. The criticism is mostly reserved for Dr. Mahmoudi.

Defendant first criticizes Dr. Mahmoudi for allegedly failing to explain his opinion as to why addition is more appropriate than combination. On this point I can only invite the attention of the WCAB to the passages cited above. As to some of the impairments, Defendant is correct that only generalities appear in Dr. Mahmoudi's opinions. I did not include these impairments in my analysis. I do not believe that any fair minded reading of those passages will fail to locate specific reasons from Dr. Mahmoudi explaining why no overlap exists and why the compaction inevitable with use of the CvC, is inappropriate in this case. This case is easily and readily distinguished from *Leo.* It is simply false for Defendant to claim, as is done in the last paragraph of page 12 of the Petition, that Dr. Mahmoudi is contradicted by Dr. Francis as to which bodily impairment should be added. Dr. Francis was not asked his opinion on this point and gave none. All in all, Defendant's arguments regarding the flaws in the Mahmoudi opinions are not arguments of fact but simple conclusions with little stated basis. They contain no specific criticisms and point out no error of fact or law of any kind.

Defendant's next argument is that the *Kite* decision should be overturned because it is allegedly inconsistent with *Fitzpatrick*. Defendant accurately quotes *dicta* in *Fitzpatrick* which arguably sheds doubt on the validity of *Kite* on the ground that whereas previous rating schedules were considered to be a 'guide only', this language is not present in the current schedule. Defendant neglects to mention such an interpretation, that is, that the current schedule must be adhered to in its entirety without deviation because it is not simply a guide but wholly binding in every aspect, would also invalidate *Almaraz-Guzman*, *Le Bouef,* and indeed *Fitzpatrick* itself insofar as *Fitzpatrick* holds that the Schedule may be departed from, where vocational evidence shows that there is no remaining ability to benefit from vocational rehabilitation. The many WCAB opinions which have applied *Kite* since *Fitzpatrick* was decided all, in my opinion, tend toward the conclusion that the *Fitzpatrick* forbore from overruling based upon sound reasoning.

Finally, Defendant argues that application of *Kite* to this case deprives Defendant of its right to apportionment. I do not pretend to understand the logic which underlies this argument. Defendant states, at page 15 of its Petition, that apportionment was correctly applied in this case (lines 10-25). The statement made by Defendant on that same page at lines 25 through 27, that the present Award constitutes 'eliminating all apportionment' in a case where Defendant states that current apportionment law was correctly applied and that the PD subject to either addition or combination was what was left after deduction of 30%, which Defendant admits was the percentage found correct by the medical evidence. Defendant then recommends that it liability should be shifted to the SIBTF. As stated, none of this constitutes a legal argument I can respond to as it has nothing to do with the facts or the law, but is rather a request that the WCAB use this opportunity to overhaul the entire system by which PD is awarded.

IV

RECOMMENDATION

DENY Reconsideration.

David L. Lauerman,
Workers' Compensation Judge