WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CECILIA MENDOZA, *Applicant*

vs.

BERRYESSA CONTRACTING, INCORPORATED;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ11197264
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings, Award and Order of April 29, 2020, the Workers' Compensation Judge ("WCJ") found, in relevant part, that on August 27, 2017, applicant sustained industrial injury to her left shoulder, neck, left lower arm, and upper back, causing permanent disability of 25%.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the WCJ erred in failing to develop the medical-legal record as it pertains to applicant's vocational expert, and that the WCJ erred in failing to weigh the entire range of evidence, including the reports of both parties' vocational experts, whose opinions support a higher level of permanent disability.

Defendant filed an answer.

We have considered the allegations of applicant's Petition for Reconsideration, the contents of the Report of the WCJ with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated below and in the WCJ's

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated July 22, 2020. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

Report and Opinion, which are both adopted and incorporated to the extent set forth herein,[2] we will affirm the Findings, Award and Order of April 29, 2020.

In further responding to applicant's contentions upon reconsideration, we agree with the following analysis in the WCJ's Opinion on Decision:

> Applicant was evaluated by Panel Qualified Medical Evaluator Dr. Gary Bocci. The parties stipulated that his reports rate 25% after adjustment, pursuant to the AMA Guides. There is no other evidence of permanent disability pursuant to the AMA Guides.
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> Applicant proffered evidence from vocational rehabilitation expert Jeff Malmuth which she asserts rebuts the [scheduled 25%] rating of her case. This report is unpersuasive for a number of reasons.
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> To begin with, Mr. Malmuth misunderstands applicant's lifting ability. Mr. Malmuth's opinion is predicated on the understanding that applicant cannot lift more than 3 to 5 pounds. This understanding is central to his analysis. (Exhibit 3, page 36.) It stems from a statement made by applicant to Dr. Bocci at the examination of November 8, 2018, that she had been given this work restriction. (Exhibit BB, page 2.)
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> Applicant appears to have misremembered her work restrictions. She was given a work restriction of no lifting greater than 10 pounds on March 15, 2018. (Exhibit 1, page 2.) She subsequently underwent surgery and reported to Dr. Bocci that she had improved about 50%. (Exhibit BB, page 5.)
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> Mr. Malmuth does not report that he reviewed the Physician's Return-to-Work & Voucher Report completed by Dr. Bocci and dated January 10, 2019. This report is not in evidence but it was reviewed and commented upon by defendant's vocational rehabilitation expert, Howard Twomey. Mr. Twomey documents that Dr. Bocci gave restrictions that applicant "may not lift/carry at a height of 'shoulder level' more than '15' pounds for more than '1' hours per day" and that she "cannot preform (sic) prolonged use of left shoulder for lifting more than 15 lbs. at shoulder level." (Exhibit B, page 3.)
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> The restrictions provided by Dr. Bocci are significantly different than that relied upon by Mr. Malmuth. Further, applicant's own testimony is that she can lift 25 pounds with her dominant right side and around 7 to 10 pounds with her left side. (Minutes of Hearing, Summary of Evidence, page 6, lines 7 to 9.)

[2] We adopt and incorporate the "Introduction" and "Facts" sections of the WCJ's Report, as appended to this decision. Otherwise, we adopt and incorporate the WCJ's Report only to the extent set forth within the body of this opinion.

> Because Mr. Malmuth [misunderstood] applicant's lifting ability, he estimated that "there will be a 75% erosion in her capacity to perform jobs within her pre-injury labor market." (Exhibit 3, page 36.) This estimate is clearly not reliable evidence of her capacity to perform work.
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> Further. Mr. Malmuth reported complaints that appear incorrect. Mr. Malmuth stated that applicant has "limited tolerance for driving." (Exhibit 3, page 18.) However, applicant testified that she did not have difficulty driving. (Minutes of Hearing, Summary of Evidence, page 6, lines 19 to 20.) This may explain why Mr. Malmuth did not find applicant capable of performing some of the jobs identified by Mr. Twomey such as courier. (Exhibit B, page 11.)
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> Mr. Malmuth also stated that applicant experiences interrupted sleep patterns due to pain causing daytime fatigue. (Exhibit 3, page 18,) However, applicant's treating physician Dr. Paul Nkadi reported that applicant does not wake up during the night due to pain. (Exhibit 2, page 1.) To the extent that Mr. Malmuth considered loss of work capacity due to daytime fatigue, this was incorrect.
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> In general, Mr. Malmuth does not provide support for his conclusory statement that "her physical limitations will prevent her from performing jobs predicted (sic) on physical ability." (Exhibit 3, page 4.)
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> Finally, Mr. Malmuth in part bases his conclusions on applicant's lack of feasibility for vocational rehabilitation. Mr. Malmuth specifically stated that he reserved the right to modify his opinions in the event that applicant does participate in vocational rehabilitation. (Exhibit 3, page 38.) Applicant testified that she is participating in vocational rehabilitation. (Minutes of Hearing, Summary of Evidence, page 7, lines 14 to 18.) According to Mr. Twomey, the vocational services are in fact being provided by Mr. Malmuth. (Exhibit B, page 6.) Mr. Malmuth has clearly changed his opinion regarding applicant's amenability to vocational rehabilitation, which further renders his report unpersuasive.

As for applicant's contentions that her vocational evidence rebutted the scheduled rating, and that the WCJ erred in not further developing the record, the WCJ correctly addresses those contentions in his Report, as follows:

> In cases such as *Tyler v. Workers' Comp. App. Bd.* (1997) 56 Cal.App.4th 389, the courts have found that there is authority to develop the record in certain circumstances. In *Tyler*, the judge believed that applicant had suffered an industrial psychiatric injury but did not have evidence to support this finding. The Court of Appeal found that there was authority to order additional evaluation.

> However, there are limits to the extent to which the record can be developed. The cases allowing development of the record do not require "that every indulgence be given to the employee and all efforts made to obtain evidence in support of a claim." (*San Bernardino Cmty. Hosp. v. Workers' Comp. App. Bd.* (1999) 74 Cal.App.4th 928, 936.)
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> 2. Neither of the vocational experts provide a basis to deviate from the [scheduled permanent disability] rating
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> Applicant argues that the Court has the ability to find a permanent disability rating "within the range of evidence" and that both vocational experts support a finding of higher PD.
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> While it is true that defendant's vocational expert agreed that applicant had suffered diminished loss of future earnings, he did not provide a precise calculation of this loss. (Exhibit B, page 12.) He opined that applicant has lost 30 to 40 percent of labor market access. (Exhibit B, page 11.)
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> Arguably this opinion could suggest a permanent disability of 30 to 40 percent. However, there is no clear rationale that this loss of labor market access is a better measure of permanent disability than that established by the [scheduled permanent disability rating]. In a situation when the measurement standard is specified by statute, there is a higher burden than simply that there is an alternate measurement partway between the [scheduled rating] and permanent total disability.

In addition to the WCJ's Opinion on Decision and Report, we offer the following points to further clarify the WCJ's analysis.

Under Labor Code section 4660.1(a), "[i]n determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury." Under subdivision (b) of the statute, the "nature of the physical injury or disfigurement" referenced in subdivision (a) incorporates the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition), with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.

Under subdivision (d) of the statute, as applicable to this 2017 date of injury, the Schedule for Rating Permanent Disabilities ("PDRS") pursuant to the American Medical Association

(AMA) Guides to the Evaluation of Permanent Impairment (5th Edition), and the schedule of age and occupational modifiers, constitute prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule, and permanent disabilities must be rated using the age and occupational modifiers in the 2005 PDRS.

Further, subdivision (g) of section 4660.1(g) specifies that the statute "does not preclude a finding of permanent total disability in accordance with [Labor Code section] 4662[,]" while subdivision (h) states that in enacting the statute, the Legislature did not intend to overrule the holding in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Almaraz-Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].[3]

In this case, some parts of the WCJ's analysis are incorrect in equating the rating of permanent impairment under the AMA Guides to the scheduled rating of permanent disability under the 2005 PDRS. Based on the various provisions of section 4660.1 outlined above, the rating of the employee's whole person impairment ("WPI") under the AMA Guides (multiplied by an adjustment factor of 1.4) is not the same as the employee's scheduled permanent disability rating under the 2005 PDRS. This is because the permanent impairment rating under the AMA Guides is just one of the components that factors into the employee's ultimate permanent disability rating. The other components are found in the schedule of age and occupational modifiers described in the 2005 PDRS.

The essential issue here is whether the opinions of the vocational experts rebut the scheduled permanent disability rating, not whether those opinions rebut the permanent impairment rating given by Dr. Bocci under the AMA Guides. It is applicant who has the burden of rebuttal to demonstrate that her injury impairs her rehabilitation, so that the loss or diminishment of her ability to compete in the open labor market is greater than that reflected in the scheduled rating. (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].)[4]

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[3] In *Almaraz-Guzman,* the Court of Appeal concluded that the language of Labor Code section 4660 permits reliance on the entire AMA Guides, including the instructions on the use of clinical judgment, in deriving an impairment rating in a particular case. The Court stated in relevant part, "the physician must be permitted to explain why departure from the impairment percentages is necessary and how he or she arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue." (75 Cal.Comp.Cases at 854.)

[4] Our Supreme Court stated in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587], "[j]ust as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating."

Here, for the reasons stated in the WCJ's Opinion on Decision and Report as excerpted above, we agree with the WCJ that the opinions of the vocational experts obtained by both parties do not rise to the level of substantial evidence. As a result, the scheduled permanent disability rating of 25%, a chief component of which originated in Dr. Bocci's evaluation of permanent impairment under the AMA Guides, has not been rebutted.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order of April 29, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
April 13, 2023

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

CECILIA MENDOZA
KNOPP PISTIOLAS
STATE COMPENSATION INSURANCE FUND, LEGAL

JTL/ara

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

Date of Injury:	August 27, 2017
Age on DOI:	45
Occupation:	Farm laborer
Parts of Body Injured:	Left shoulder, neck, left lower arm, and upper back
Identity of Petitioner:	Applicant
Timeliness:	The petition was timely filed on May 20, 2020
Verification:	The petition was verified
Date of Order:	April 29, 2020
Petitioners Contentions:	Petitioner contends that it was improper to reject the vocational expert evidence proffered on the case rather than developing the record through the vocational expert. Petitioner also contends that in the alternative the WCALJ should have awarded a higher level of permanent disability by making a finding within the range of evidence.

II
FACTS

Applicant sustained an injury to her left shoulder on August 27, 2017, while sorting tomatoes on a conveyer belt. She was removing a clump of dirt and rocks which was heavier than it appeared and caused her left shoulder to become injured. (Exhibit BB, pages 1 to 2.) Eventually it was determined that she had sustained a rotator cuff tear, which was surgically repaired on June 28, 2018. (Exhibit BB, page 2.) She also developed secondary myofascial irritation in the scapula and cervical musculature. (Exhibit AA, page 5.)

Applicant was evaluated by Gary Bocci, D.C., serving as Panel Qualified Medical Evaluator (PQME). Dr. Bocci found that applicant had limitations in the range of motion of her left shoulder. (Exhibit BB, page 5.) Dr. Bocci subsequently provided an evaluation of applicant's neck complaints, finding them industrially caused and placing her in DRE Category II. (Exhibit AA, page 4.)

Applicant procured a report from vocational expert, Jeff Malmuth. Mr. Malmuth provided a report in which he opined that applicant had sustained a total loss of her earning capacity. (Exhibit 3, page 36.) Defendant procured a report from its own expert, Howard Twomey, who opined that applicant did have vocational challenges but that she was able to re-enter the workforce. (Exhibit B, page 1.)

The matter was submitted for trial, primarily on the issue of whether applicant's vocational expert evidence had rebutted the AMA impairment findings of the PQME. The parties stipulated that the PQME reports rated 25% after all adjustments, but before consideration of the rebuttal evidence. In a decision dated April 29, 2020, it was determined that the findings had not been successfully rebutted, and an award issued consistent with the AMA impairments. It is this determination which is the subject of the Petition for Reconsideration.

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