

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

DEBRA ANDERSON, *Applicant*

vs.

**HERITAGE PROVIDER NETWORK; TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ8581600
Los Angeles 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.

In evaluating the medical evidence here, we note that the parties have chosen an AME and we presume that an AME has been chosen by the parties because of his or her expertise and neutrality. Therefore an AME's opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive. (*Power v Workers' Compensation Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal. Comp. Cases 114]; *Brannon v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 333 (writ den.); *Siquiros v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 150 (writ den.).)

In addition to applicant's testimony regarding her ability to use her upper extremities, the AME set forth specific work modifications and preclusions. Based on her right upper extremity impairment, applicant is precluded from performing fine manipulation tasks, forceful gripping/grasping activities, and working above shoulder level. She is limited to occasional repetitive tasks with her right upper extremity. Based on her left upper extremity impairment, applicant is precluded from forceful gripping and grasping and performing prolonged repetitive tasks with her left hand. (Joint Exh. 1, June 23, 2020, Bruce Fishman, M.D., Agreed Medical Evaluation Report, pp. 47-48.) The AME did not provide an *Almaraz/ Guzman* rating because "the impairment rating

based on the AMA Guides does result in a permanent impairment award that is an accurate measure of this employee's permanent disability/ impairment." (Id. at 48.)

The work limitations provided by the AME do not support a finding that applicant is totally disabled or that she has lost the use of her hands within the meaning of Labor Code section 4662(a)(2).

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 1, 2022

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

**DEBRA ANDERSON
DIMACULANGAN & ASSOCIATES
WILLIAMS BECK & FORBES**

MWH/oo

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 APPLICANT'S PETITION FOR
RECONSIDERATION**

I
INTRODUCTION

Applicant has filed a timely, verified and properly served petition for reconsideration in the above matter, following this judge's award of 55% permanent disability with apportionment arising from the applicant's admitted injury to the right shoulder, right elbow, right hand, cervical soft tissue, and left shoulder.

The within matter involved a cumulative trauma injury which took place over Applicant's three years of employment as an outpatient nurse case manager with defendant Heritage Provider Network. Applicant's job duties included transporting heavy binders, patient files, her laptop and work materials to different corporate work locations, assigning and assessing patients' needs for home health care and doctors' visits, keyboarding and holding the telephone.

On reconsideration, Applicant contends substantially as follows:

1. The WCJ erred in finding that Applicant testified to being able to do fine manipulation with her hand.
2. The WCJ erred in finding applicant did not meet her burden in rebutting the schedule or proving total loss of the use of both hands.
3. The WCJ erred in rejecting the reports of the vocational rehabilitation expert Laura Wilson.

II
FACTS

Applicant, Debra Anderson, born April 22, 1956, filed a claim for cumulative trauma injury while employed by the defendants, Heritage Provider Network, as an outpatient nurse case manager, during the period August 20, 2011 through August 20, 2012. The applicant was responsible for assessing and assigning outpatient care services such as doctors' visits and home health care. (Minutes, 10/13/21, p. 5, ln 20). The applicant worked in various locations and was mostly required to carry equipment when she worked in the corporate office or the clinic in Burbank. (Id. at ln 21-22) Materials she transported included patient files, resource binders, her

work laptop, and other work materials. (Id. at ln 23). The heaviest item she was required to lift was thirty-five pounds. (Id. at ln 25). Applicant transported materials from the parking lot to the office, to her home, and back out to the car when returning to work. (Id. at p. 6 ln I).

Prior to her employment with defendant, Heritage Provider Network, the applicant worked as an ambulatory risk case manager for eight or nine months with a company that would later become part of Heritage Provider Network. (Defendant's Exhibit B, p.3 / Applicant's Exhibit 3, p. 6). Prior to her employment there the applicant worked as a telephonic case manager for seven years at Ships. (Applicant's Exhibit 3, p. 6). The applicant has a history of pre-existing injuries to her right hand, right shoulder and cervical spine prior to her employment by defendant. (Joint Exhibit 11 p.11). The Agreed Medical Evaluator, Bruce Fishman, notes a history of surgical intervention to the applicant's right wrist and cervical spine. (Joint Exhibit I, p. 21). The applicant underwent surgical carpal tunnel decompression and dorsal compartment release for her right wrist in 2000 and 2001 respectively. (Id.) Additionally, the applicant underwent a CS-6 and C6-7 anterior cervical discectomy and fusion in June 2003. (Id.). The AME also found applicant suffered from degenerative osteoarthritis in both her right wrist and right shoulder acromioclavicular joint. (Id. at p. 66).

Applicant has not worked any other jobs since the last days she worked roughly nine years ago. (Minutes, 10/ 13/21, p. 6 at ln 4-5).

This matter was set based on Applicant's request for trial. Trial commenced on October 13, 2021. The applicant and her daughter, Jennifer Anderson provided testimony on both direct and cross-examination regarding applicant's activities of daily living. The matter was submitted the same day. On December 9, 2021, the court found that Applicant had a disability rating of 55% after the application of KITE and apportionment based on the reporting of the Agreed Medical Evaluator, Bruce Fishman. *Athens Administrators v. Workers' Comp. Appeals Ed.* (2013) 78 Cal. Comp. Cases 213 (Kite). The court found that applicant failed to show a "loss of both hands or the use thereof" pursuant to Labor Code 4662(a)(2) to support a finding of total permanent disability and that the reports of applicant's vocational rehabilitation expert, Laura Wilson, were not sufficient to rebut the schedule. The Applicant thereafter filed the within Petition for Reconsideration on December 31, 2021.

III
DISCUSSION

Applicant failed to meet her burden pursuant to Labor Code 4662(a)(2) and Labor Code Section 3202.5.

The applicant did not meet her burden of proof pursuant to Labor Code sections 4662(a)(2) and 3202.5 to support a finding of total permanent disability. Per Labor Code 4662(a)(2) an injury is conclusively presumed to be a total if it results in the "loss of both hands or the use thereof." Though the appeals board has found the conclusive presumption applied when the evidence showed an applicant was unable to grip, grasp, handle, write, type, or drive, the facts of this case do not support such a finding. *Kaiser Foundation Hospitals v. WCAB (Dragomir-Tremoureux)* (2006) 71 CCC 538 (writ denied).

While the court acknowledges applicant may not be able to use her hands in the way she was able to prior to her industrial injury, based on the applicant's own testimony and that of her daughter, Je1mifer Anderson, the applicant still has use of her hands including some fine motor capabilities.

For instance, applicant testified that she can write a check (Minutes 10/13/21, p.7 ln 8). She testified that her left hand is getting worse because she does everything with her left hand except for writing (Minutes, 10/13/21, p.7 at ln 17-18.). Applicant testified that she has been living alone since 2015 (Id., p.8 at ln 1 8), leading the court to believe she is able to do some activities of daily living required to survive such as eating and drinking. She testified to being able to pick up items if she concentrates on it. (Id. at ln 2-3). She testified that she stopped using a razor where you have to change the blade because she kept dropping it and now buys disposable razors (Id. at ln 4-5). She testified to being able to grocery shop for herself most of the time (Id. at ln 12-13). She testified to rarely driving, leading the court to believe that she still drives at times. (Id at ln 18-19). Moreover, her daughter, Jennifer Anderson testified that instead of regular floss applicant now uses floss sticks and a Waterpik (Id., p.9 at ln 22). She testified that she brings applicant pre-cut food in Tupperware that her mom can open (Id. p. 10 ln 5-6), leading the court to believe the applicant is able to open Tupperware and feed herself.

As a result of the witness testimony and the medical record, the court properly found that the applicant failed to meet her burden in showing a "loss of both hands or the use thereof" pursuant to Labor Code 4662(a)(2) to support a finding of total permanent disability.

The reports of applicant's vocational rehabilitation expert Laura Wilson, were not sufficient to rebut the schedule.

Applicant's vocational rehabilitation expert, Laura Wilson, failed to consider the proper factors when assessing applicant's transferable skills and ability to compete in the open labor market. Prior to her employment with defendant, Heritage Provider Network, the applicant worked as an ambulatory risk case manager for eight or nine months with a company that would later become part of Heritage Provider Network. (Defendant's Exhibit B, p.3 / Applicant's Exhibit 3, p. 6). Prior to her employment there the applicant worked as a telephonic case manager for seven years at Ships. (Applicant's Exhibit 3, p. 6).

Based on the testimony of applicant and the occupation history provided in the record and reports of AME Fishman, the applicant's job duties over at least the last four to ten years of employment were essentially sedentary, consisting of computer and telephonic work with some requirements to transport materials from one location to another. As a nurse case manager she assessed patients' needs to determine and/or coordinate assignment of home health care, and doctors' visits. (Minutes, 10/13/21, p. 5 ln 20-25, p.6 ln 1-4). This required her to use a phone, computer, resource binders and review patient files. (Id.) (Joint Exhibit 11 p.17).

In the record review by AME Fishman, there is a Lakeside Community Healthcare Unsigned Job Description. (Joint Exhibit 11 p.9). This description indicates in part that:

"A vital care case manager is responsible for the assessment, treatment planning, intervention, monitoring, evaluating and documentation on identified high risk members." (Id.)

Under physical demands it includes the following:

"No patient lifting, squatting, climbing, kneeling, crawling, pushing or pulling . . . the job does not require driving, exposure to excessive noise, exposure to extreme temperature or humidity or exposure to dust, gas, fumes or chemicals. " (Id.).

Though she worked in this position for eight or nine months, this job description is similarly aligned with that of her employment with defendant based on her testimony and the medicals. (Minutes 10/13/21, p. 5 ln 20-25, p.6 ln 7-8 (Joint Exhibit 11 p.17). The applicant held a similar title for seven years at Ships as a telephonic case manager. As such, the court expects that her job duties were more consist with that of her latter two employments than that of maybe a general nurse who worked the floor caring for patients.

When the applicant's vocational rehabilitation expert Laura Wilson assessed applicant's transferable skills, she used the duties of a general nurse rather than that of a nurse case manager. (Applicant's Exhibit 1, p. 7). This could have significantly affected the results of the transferability analysis and thus Ms. Wilson's findings since one job is rather physical in nature and the other is rather sedentary in nature. Further, Ms. Wilson seems to take into account applicant's emotional state in determining employability when psyche is not a component of this case. (see Applicant's Exhibit 1, p. 18 "*By that I mean she can't work 5 days per week, 8 hours per day and her ability to work a full or part time job would require that she be able to set the total hours worked, the days and the hours worked such that she would be able to come and go as she pleased and work at her own pace and whenever she was able to physically and emotionally able to.*"). It is improper for Ms. Wilson to rely on perceived psychological issues when injury to psyche is not a component of this case and there is no medical evidence addressing psyche. Assigning the necessary weight to Ms. Wilson's report the court properly found it was not sufficient to rebut the schedule.

Additionally, AME Fishman provided work restrictions for applicant and made no mention that applicant was unemployable from an orthopedic standpoint or that applicant lost use of both her hands. (Joint Exhibit 1, p.51-52 and 61).

IV **RECOMMENDATION**

For the reasons stated above, it is respectfully requested that applicant's Petition for Reconsideration be denied.

Date: 1/19/2022

Desirae L. Hutchison
Workers' Compensation Judge