WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DENNIS COOKSEY, ***Applicant***

vs.

WORLDWIDE TECH SERVICES; ZURICH AMERICAN INSURANCE, ***Defendants***

Adjudication Number: ADJ10126914
San Francisco 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 addition, the Labor Code requires that:

> The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by the appeals board or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board. The petition shall be verified upon oath in the manner required for verified pleadings in courts of record and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof.
> (Lab. Code, § 5902, emphasis added.)

Moreover, the Appeals Board Rules provide in relevant part: (1) that "[e]very petition for reconsideration … shall fairly state all the material evidence relative to the point or points at issue [and] [e]ach contention contained in a petition for reconsideration … shall be separately stated and clearly set forth" (Cal. Code Regs., tit. 8, former § 10842, now § 10945 (eff. Jan. 1, 2020) and (2) that "a petition for reconsideration … may be denied or dismissed if it is unsupported by specific

references to the record and to the principles of law involved" (Cal. Code Regs., tit. 8, former § 10846, now § 10972 (eff. Jan. 1, 2020).

In accordance with section 5902 and WCAB Rules 10945 and 10972, the Appeals Board may dismiss or deny a petition for reconsideration if it is skeletal (e.g*., Cal. Indemnity Ins. Co. v. Workers' Comp. Appeals Bd.* (*Tardiff*) (2004) 69 Cal.Comp.Cases 104 (writ den.); *Hall v. Workers' Comp. Appeals Bd.* (1984) 49 Cal.Comp.Cases 253 (writ den.); *Green v. Workers' Comp. Appeals Bd*. (1980) 45 Cal.Comp.Cases 564 (writ den.)); if it fails to fairly state all of the material evidence, including that not favorable to it (e.g., *Addecco Employment Services v. Workers' Comp. Appeals Bd.* (*Rios*) (2005) 70 Cal.Comp.Cases 1331 (writ den.); *City of Torrance v. Workers' Comp. Appeals Bd.* (*Moore*) (2002) 67 Cal.Comp.Cases 948 (writ den.); or if it fails to specifically discuss the particular portion(s) of the record that support the petitioner's contentions (e.g., *Moore, supra*, 67 Cal.Comp.Cases at p. 948; *Shelton v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 70 (writ den.).) The Petition for Reconsideration filed herein fails to cite with specificity to the record. Therefore it is subject to dismissal or denial.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 8, 2021

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

DENNIS COOKSEY
LAW OFFICE OF DAVID L. HART
LAW OFFICES OF THOMAS BURNS

PAG/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Anthony N. Corso, Workers'Compensation Judge, hereby submits his report and recommendation on the Petition for Reconsideration filed herein.

INTRODUCTION

Applicant's Petition for Reconsideration seeks an order reversing the Finding of Fact that the Applicant has not rebutted the schedule rating and an award of permanent and total disability. As the Applicant has not sought reconsideration on the Findings that the Applicant failed to demonstrate industrial injury to the lumbar spine, that determination is considered final. (See: Labor Code section 5904.) The Applicant's petition incorrectly asserts the undersigned failed to evaluate the vocational and testimonial evidence presented by the Applicant and provides no statutory, regulatory or case law authority to support the assertions made. As the Applicant's assertions at trial and on Reconsideration are based entirely on the Applicant's subjective complaints without any medical support the undersigned recommends Reconsideration be denied.

RELEVANT FACTS

The following facts are adopted and incorporated from the original Finding and Award and Opinion on Decision.

> The Applicant, Dennis Cooksey, born May 25, 1944, while employed during the period ending September 11, 2015, as a computer technician, occupational group 320, in South San Francisco, California, sustained injury arising out of and in the course of injury to the low back, and claims to have sustained injury to the hips. At the time of injury the employer's workers' compensation carrier was Zurich American Insurance.
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> The Applicant was evaluated by Agreed Medical Evaluator (AME) Dr. David Pang on December 16, 2020. Dr. Pang noted the Applicant was hired by Worldwide Service on June 1, 2015 and laid off on September 11, 2015. (Defendant Exhibit A, Page 2.) The Applicant reported that he spent most of his time hunched over at the waist and stooping. (*Id*.) The Applicant reported that he first became aware of pain in his lower back sometime in 2014 that progressed and became worse as time went on. (*Id.*) Dr. Pang found the Applicant permanent and stationary and provided a 26% whole person impairment for the lumbar spine. (*Id.* at 6.) With regard to the Applicant's right hip, Dr. Pang found the Applicant sustained referred pain to the right hip, but concluded that he did "not feel that Mr. Cooksey sustained an injury or has a disorder oft eh right SI joint or right hip." (*Id.* at 7.) Dr. Pang apportioned 10%

of the Applicant's complaints to a 2009 fall off of a ladder. (*Id*.) While Dr. Pang found the Applicant would not "be able to perform the full spectrum of the job activities required," he failed to provide any workrestrictions. (*Id.* at 8.)

Dr. Pang issued a supplemental report on March 23, 2017. (Def. Exhibit B.) Dr. Pang confirmed his prior calculation of permanent disability under the range of motion method and concluded the Applicant had sustained only one period of cumulative trauma through September 11, 2015. (*Id.* at 2.) Dr. Pang issued a second supplemental report on August 12, 2017 and provided no change to his opinions. (Defendant Exhibit C.)

Dr. Pang re-evaluated the Applicant on October 26, 2018 and provided his report of the same date. (Defendant Exhibit D.) Dr. Pang found the Applicant became permanent and stationary one year after his last lumbar spine surgery, August 28, 2018. (*Id.* at page 6.) Dr. Pang re-evaluated the range of motion for the lumbar spine and found the Applicant had a 29% whole person impairment with an additional 3% pain add-on. (*Id*.) Dr. Pang found again that the Applicant's lumbar spinal injury was industrially caused, but conclude the Applicant's L3 spinal fracture was non-industrially caused; on this basis, Dr. Pang concluded the Applicant's injury was apportionable 15% to the L3 fracture and other prior causes. (*Id.* at 7.) Dr. Pang again concluded the Applicant was not "able to perform the full spectrum of the job activities required," but did not give work restrictions. (*Id*.)

On December 24, 2019 Dr. Pang provided his final supplemental report. (Defendant Exhibit E.) Dr. Pang provided work restrictions for the applicant of "Mr. Cooksey is precluded from lifting anything greater than 25-30 pounds; from repeatedly bending, twisting, turning and stooping for no more than 15 minutes without a 5 minute break; from repeatedly kneeling squatting and/or climbing for no more than 10 minutes without a 5 minute break and from prolonged weight bearing and prolonged sitting or driving for no more than 50 minutes without a 10 minute break. (*Id.,* P. 1-2.)

The Applicant elected to be evaluated by Ira Cohen as his vocational evaluator. Mr. Cohen issued his first report of April 4, 2019. (Applicant Exhibit I.) Mr. Cohen noted that despite being treated and evaluated by a number of physicians, "no formal work restrictions are currently under consideration." (*Id*. at 15.) Despite this, Mr. Cohen concluded "I believe I am qualified to provide at least a preliminary post-injury vocational opinion of Mr. Cooksey's rehabilitation and employment potential. This assumes, of course, that

there is sufficient medical evidence within the record, which can allow for such a conclusion. Of course, should formal work restriction from a physician eventually be provided in this matter, I will be prepared to re-analyze my findings." (*Id*.) Mr. Cohen noted his conclusions were based "not [on] a medical-legal determination on my part, but an interpretation of the medical evidence." (*Id*. at 18.) Mr. Cohen reached his final conclusion that "given the overall evidence that I have reviewed and considered, and in the absence of formal work restrictions from the physicians, it is my initial opinion that Mr. Cooksey may be able to perform selected sedentary and semi-sedentary work. . . . More realistically however, when also taking into account the diagnosed "chronic pain syndrome"· ... it is entirely possible that even with the above identified recommendations Mr. Cooksey would not likely be employable in any capacity." Here. I am referring to the self-reported spiking of pain 'and the need for narcotic pain medications.'" (*Id*. at P. 21.)

The Defendant elected to have the Applicant undergo vocational evaluation with Emily Tincher. Mr. Tincher issued her first report of May 22, 2019. (Defendant Exhibit F.) As with Mr. Cohen, Mr. Tincher noted "there were no work restrictions provided by Dr. Pang. Injuries that involve the low back often are best accommodated by the worker being able to sit and stand as needed. Therefore, I will consider occupations identified in the 'Employer Validation of Jobs Performed with a Sit/Stand Option.'" (*Id*. at 22.) Ms. Tincher concluded "Mr. Cooksey is not totally disabled under Labor Code 4662. He was evaluated by Orthopedic AME Dr. Pang. The low back injury can be accommodated. Therefore, Mr. Cooksey does not qualify for total disability under Labor Code 4662, and is not totally disabled from the industrial injury 'in accordance with the fact.'" (*Id* at 33.) Ms. Tincher concluded the Applicant had a 0% loss of earning capacity. (*Id*. at 34.)

Ms. Tincher completed a review of Mr. Cohen's initial report and issued her first supplemental report of June 19, 2019. (Defendant Exhibit G.) Following a review of Mr. Cohen's report and statement and the effect of pain medication, Ms. Tincher concluded "none of these statements are associated with any actual facts. Mr. Cohen did not perform vocational testing. He has no objective evidence that Mr. Cooksey is significantly impaired by his pain or narcotic pain medication from functioning. There is no indication that, at the vocational interview ... he had difficulties with communicating or ability to function cognitively. Mr. Cooksey reported that he becomes irritable. However, there have been no observations of him being irritable during the vocational evaluations. Mr. Cohen observed and noted that Mr. Cooksey was, in fact, polite and cooperative. …Mr. Cohen simply jumped to the conclusion that Mr. Cooksey is 100% or totally disabled

based on the subjective pain report and his personal opinions regarding the side effects of narcotic pain medication. There is no evidence to support his conclusion. There is no evidence that Mr. Cooksey is limited to part time work." (*Id.* At 4.) Ms. Tincher further noted "Mr. Cohen placed great emphasis on the fact that Dr. Pan g produced a 3% pain acid-on in the ratings. However, this is not a work restrictions and cannot be used as such. Therefore, Mr. Cohen's opinions are not based on the medical records and he assumed the role of producing work restrictions above and beyond those found in the medical report. It is not the role of the vocational expert to form medical opinions. Mr. Cohen's conclusions are medical unsubstantiated." (*Id.* at 5.) Ms. Tincher then did not change her opinion.

Mr. Cohen issued a report of August 23, 2019 in response to Ms. Tincher's reporting. (Applicant Exhibit 2.) In his final conclusion Mr. Cohen noted "Given that Dr. Pang's only documented medical-vocational related opinion was that Mr. Cooksey was unable to return to his usual and customary occupation, any other rehabilitation and employment findings would be speculative." (*Id.* at 2.)

Ms. Tincher issued her final report on January 12, 2020. (Defendant Exhibit H.) Mr. Tincher reviewed the final report of AME Dr. Pang before concluding that the job duties for "Computer User Support Specialists ... do not involve lifting or repair in g computers. This is a skilled job, previously performed by Mr. Cooksey, that is sedentary but can be modified to allow for a Sit/Stand work station." (*Id.* at 3.) In addition, Ms. Tincher concluded "However, there are more jobs available to Mr. Cooksey than are cited in my prior report. I have provided additional *Dahl* analysis and find that Mr. Cooksey's knowledge, skills and functional capacity are sufficient to work in Semi-skilled jobs such as IT Help Desk worker, which is a sedentary job. … Therefore, there is no change in my opinion. I find that Mr. Cooksey is amenable to vocational rehabilitation; however, clue to *Montana* factors, he is not participating and has withdrawn from the labor market." (*Id.* at 8.)

Mr. Cohen issued his final report dated February 26, 2020. (Applicant Exhibit 3.) While finding the Applicant capable of alternating sitting and standing based upon Dr. Pang's reporting (*Id.* at P. 8), Mr. Cohen again concluded "we now need to address potential issues of pain, medication for symptom management, and potential impact on focus and concentration. Departing from Dr. Pang's recent formal work restrictions, it would not be appropriate to address whether these issues could interfere with, or potentially entirely eliminate Mr. Cooksey's rehabilitation potential." (*Id.* at 9.) Mr. Cohen concluded, based upon his experience, that individuals using pain medication "often

experienced cognitive deficits, especially those related to focus and concentration. This often resulted in a diminished ability to learn and apply new job skills." (*Id.)* Based upon these pain findings Mr. Cohen concluded "my previous opinions do not require any revisions." (*Id.*)

The parties appeared for trial on November 16, 2020. The Applicant testified on his own behalf. Notably, Mr. Cooksey testified about experiencing fatigue, dizziness, and moments of confusion as a result of his medication usage. The Applicant testified that he did not believe he could do any employment activities on a sustained basis as a result of his pain levels and his medication usage. The parties stipulated that if the Applicant could not demonstrate rebuttal of the schedule rating, the case would rate to 45% permanent disability pursuant to the schedule rating.

DISCUSSION

1) The Applicant failed to submit any medical evidence that demonstrates the existence of work restrictions resulting from the use of medication.

The Applicant incorrectly asserts the findings of fact and award are not well supported because a determination was not made regarding the Applicant's credibility. The undersigned finds the Applicant credible regarding his subjective complaints. However, the Applicant's subjective complaints as a result of injury and medication usage both do not form a basis upon which the undersigned or a vocational evaluator can reach conclusions and are not outcome determinative when rebutting the schedule. The undersigned recognizes that "the subjective complaints of an injured employee may support a permanent disability finding if it is clear that the injury caused the disability, that is, if the cause of the subjective condition does not require medical proof." *Kostka v. V Dolan Trucking,* 2014 Cal. Wrk. Comp. P.D. LEXIS 684, *19-20. Notably, each of the cases quoted by the Board in reaching the conclusion in *Kostka* predated the change in the rating methodology to the AMA Guides after SB 899. In applying the rule in *Kostka* literally, however, the undersigned does not consider it "clear that the [medication] caused the [work restrictions]" the Applicant complains of. Rather, it is necessary for the Applicant's complaints regarding the effects of medication usage and subjective restrictions to be evaluated by a medical evaluator. See: *Fowler v. Wolfgang Puck Cater,* infra. This conclusion is consistent with relevant regulations defining "work restrictions" as "permanent medical limitations on employment activity *established by the treating physician, qualified medical examiner or agreed medical examiner.*" Title 8 Cal. Code of Reg. 10116.9(t), emphasis added. There exists no medical evidence to support the existence of any work restrictions as a result of the Applicant's Medication usage. Rather, the Applicant relies upon his own description of complaints as the sole basis for his work restrictions. The Applicant failed to seek any comment from the medical evaluators regarding the effects of medication usage and any resulting work restrictions. This notable lack of any medical evidence of work restrictions as a result of the Applicant's medication

usage renders the Applicant's subjective complaints limited in their relevance in rebutting the schedule rating.

Prior holdings of the Board support finding the Applicant has not met his burden of proof to establish the imposition of work restrictions as a result of medication. The present matter is nearly identical to prior holdings by the Board. See: *Jones v. Los Angeles Unified Sch. Dist.,* 201 2 Cal. Wrk. Comp. P.D. LEXIS 296. As the WCJ explained in *Jones,* the vocational evaluator's consideration of the effects of medications appears to be based upon applicant's self-reporting and not upon substantial medical evidence that addresses how the medications affect her ability to return to work and to engage in activities of daily living. Evidence from a lay witness on an issue requiring expert opinion is not substantial evidence." *Id.* at *11. Similarly, the Applicant here relies only upon his subjective complaints for the assertion that "[i]f the Judge discussed the testimony of Mr. Cooksey, it would beclear that Mr. Cooksey is unable to perform his basic daily functions. Also, the finding of 45% Permanent Disability do not reflect the true nature of Mr. Cooksey's disability status." (Petition for Reconsideration, Page 3.) The Applicant has not submitted any evidence from a medical evaluator that supports these subjective complaints being applied as actual work restrictions. Again the facts in *Jones* and the present matter are identical, with the Board there adopting the WCJ's conclusion that "no physician reporting in this case has indicated Applicant cannot work because of the effects of her medications. In fact, no physician has given any work restriction based on Applicant's medication usage. If the effect of the medication were as pronounced as [the vocational evaluator] claims, one would expect that the physicians would have addressed that fact." *Jones,* supra, at *8. A physician must determine whether the Applicant's subjective complaints of pain or the effects of medication usage result in specific work restrictions; the work restrictions imposed by a physician must then be evaluated by a vocational evaluator to determine whether the Applicant is amenable to rehabilitation pursuant to *Ogilvie.* As in *Jones,* supra, the evidence from Dr. Pang does not support any work restrictions being imposed as a result of the Applicant's medication usage. As a result, the Applicant's complaints alone and any opinion that the Applicant has rebutted the schedule rating based solely upon the Applicant's subjective complaints cannot be considered substantial.

It is inappropriate to develop the record further on the question of the Applicant's rebuttal of the schedule. Notably, the issue of the Applicant's rebuttal of the schedule and allegation of permanent and total disability were previously set for trial. See: Pre-Trial Conference Statement, August 2, 2019, EAMS Doc. ID: 70973606. The matter proceeded to trial on December 6, 2019 and was ordered off calendar at the undersigned's direction with the following noted in the comments on the Minutes of Hearing: "Matter ordered off calendar; DFEC report based off no-work restrictions ever provided by AME." See: Minutes of Hearing and Summary of Evidence, Dec. 6, 2019, EAMS Doc. ID: 71787264. The Defendant filed a new Declaration of Readiness on February 11, 2020 to which the Applicant filed no objection. The matter proceeded to mandatory settlement conference and was set for trial without any noted objection by the Applicant or additional discovery to be completed. Similarly, no objection or request for additional discovery was ever filed or noted by the Applicant prior to or on the day of trial. While additional discovery may

provide some basis to support finding work restrictions exist as a result of the Applicant's medication usage, to do so in circumstances such as this - most notably where the undersigned previously ordered the matter off calendar because the record was not substantial evidence in the vocational issues presented and the Applicant both previously and presently has submitted no medical evidence of the effects of his medication - would serve as a rescue of the Applicant from the failure to adequately prove up his case. Such a development of the record would be an abuse of authority. See: *Quintero v. PBC Holding Corp. dba Commercial Cleaning Systems,* 2015 Cal. Wrk. Comp. P.D. LEXIS 610 (applicant's failure to provide records to the QME did not justify development of the record). As in *Quintero,* the lack of evidence on the work restrictions resulting from the Applicant's medication usage is the result of the Applicant's failure to submit the allegation of such work restrictions from medication to the QME for consideration. On this basis·, the undersigned recommends that the finding that the Applicant failed to meet his burden be affirmed and made final.

2) <u>Ira Cohen's conclusion that the Applicant is not amenable to rehabilitation is not substantial evidence because it is not based upon any medical evidence.</u>

Mr. Cohen's conclusion that the Applicant is not amenable to rehabilitation is not substantial evidence because it relies solely on Mr. Cohen's speculation on areas outside his expertise and lacks anysupport in the medical evidence. The Board has previously held that "Given that [a vocational evaluator] is not a medical doctor, he lacks the competency to offer an expert opinion with regard to the impact applicant's medications may have on her ability to engage in any gainful employment. Additionally, there is no specific discussion of this issue in the medical records lo support [the vocational evaluator's] opinion. *Fowler v. Wolfgang Puck Catering Events,* 2012 Cal. Wrk. Comp. P.D. LEXlS 622, *8. Mr. Cohen concludes Dr. Pang's diagnosis of chronic low back pain syndrome with a 3% pain add-on "***potentially*** results in additional vocational-related limitations. This is especially true, given his reliance upon narcotic pain medication for symptoms management. In my experience, all of these factors are significantly relevant in this case, realistically rendering Mr. Cooksey without the 'Ability to Work,' at the very least with his rehabilitation 'impaired,' if not entirely 'eliminated'" (Applicant Exhibit 2, Page 11, emphasis added.) Mr. Cohen admits he reaches these conclusions by "Departing from Dr. Pang's recent formal work restrictions" and considering whether issues with pain and medication "could interfere with, or potentially entirely eliminate Mr. Cooksey's rehabilitation potential." (Applicant Exhibit 3, Page 9.) As Mr. Cohen admitted in his initial report, "We do know that Dr. Pang has concluded that Mr. Cooksey cannot perform his usual and customary occupation. But, *whereas many physicians incorporate an individual's pain-related impairment into their post-injury return-to-work potential (in the form of work restrictions), these have not actually been advanced in this case.* But, I believe it is fair to conclude that Mr. Cooksey's actual limitations, his pain, and the use of 'narcotic pain medication' will significantly impair, if not totally eliminate Mr. Cooksey's restraining and 'Ability to Work.'" (Applicant Exhibit 1, Page 20, emphasis added.) When discussing Mr. Cooksey's amenability to rehabilitation based solely upon Dr. Pang's work restrictions, Mr. Cohen asserted in his initial report and affirmed in his final report "My next finding is that the medical evidence yields the conclusion that Mr. Cooksey possesses

sufficient residual abilities such that he could potentially perform selected employment at the following disability levels ..." (Applicant Exhibit 3, Page 5, affirmed at Page 9-10.) Mr. Cohen admits Dr. Pang's work restrictions permit for the Applicant to perform some work activities. Mr. Cohen's final conclusions, however, relied upon his experience working with individuals taking prescription medication, eschewing the work restrictions of Dr. Pang. As is discussed below, Mr. Cohen concluded the work restrictions imposed by Dr. Pang result in the Applicant being found amenable to rehabilitation. As a result of Mr. Cohen failing to rely upon the conclusions and work restrictions imposed by Dr. Pang and instead is basing his conclusions solely upon Mr. Cohen's own speculation, it is not substantial evidence.

Mr. Cohen's reporting concludes that applying AME Dr. Pang's work restrictions supports concluding the Applicant is amenable to rehabilitation. The Applicant asserts "Mr. Cohen's reporting is supported by the work restrictions of the AME Dr. Pang, and by the testimony of the Applicant in regard to his activities of daily living." (Applicant's Petition for Reconsideration, Page 2, Paragraph 6.) As is noted in the original Opinion on Decision, both Mr. Cohen and Ms. Tincher's reporting support finding Dr. Pang's work restrictions support concluding the Applicant is amenable to rehabilitation and thus has not rebutted the schedule. The following is adopted and incorporated from the original Opinion on Decision:

> Both the reporting of Mr. Cohen and Ms. Tincher make clear that based solely upon the work restrictions imposed by Dr. Pang the Applicant is amenable to rehabilitation and has therefore not rebutted the schedule. Mr. Cohen notes that based solely upon the work restrictions imposed by AME Dr. Pang that "perhaps he would have access to occupations with a 'sit/stand' option, for example, this would be selected jobs as a Bench Assembler/Electronics Assembler. He may be able to alternate sitting with standing/walking at his own discretion. Moreover, there are selected clerical jobs that would allow for alternating position after prolonged sitting. However, these are difficult to identify and quantify. In terms of retraining, obviously sitting in a classroom where one is to learn no skills, requires the activity of "prolonged" sitting. Whether or not it is realistic for a student, such as Mr. Cooksey, to stand at his own discretion (should breaks not be readily available), is impossible to identity or quantify. Thus, even rehabilitation training opportunities are significantly impaired for Mr. Cooksey." (Applicant Exhibit 3, Pages 8-9.) It is inherent in the statement that rehabilitation training is "significantly imp aired" is Mr. Cohen's admission that there are some occupations or vocational retraining opportunities that the Applicant would be capable of, however limited. Such a nuanced analysis is not necessary, however, as Mr. Cohen specifically notes occupations the Applicant could directly be placed in. As a result, the Applicant is therefore amenable to rehabilitation. Similarly, Ms. Tincher concludes more directly that Dr. Pang's work restrictions would allow for direct placement and/or vocational retraining. The Court in Dahl made clear an individual is not amenable to rehabilitation when they can

> demonstrate they are "incapable of rehabilitation." Such a showing requires the individual prove either there exists no opportunities for direct placement or that the Applicant cannot benefit from vocational retraining. See: *Ogilvie, supra; Contra Costa County v. Workers' Comp. Appeals Bd.,* 240 Cal. App. 4th 746, 761. As both Defend ant and Applicant's vocational evaluators conclude the Applicant is capable of direct placement based upon the AME's work restrictions, the Applicant is amenable to rehabilitation and cannot rebut the schedule rating.
> (Opinion on Decision, Pages 6-7.)

When considering the only medical work restrictions imposed by any physician in the case. Mr. Cohen's reporting reaches the conclusion that the Applicant is amenable to rehabilitation.

3) The Applicant's allegations in the Petition for Reconsideration are factually and legally incorrect.

The Applicant's Petition for Reconsideration misstates the holdings in the Finding and Award, discussion in the opinion on decision, and fails to state any relevant statutory, regulatory, or case law support for the assertions made. The Applicant's Petition for Reconsideration asserts the "Findings of Fact do not discuss the vocational expert testimony of Mr. Ira Cohen, wherein, Applicant was found to be permanently and totally disabled." (Petition for Reconsideration, Page 2, Ln. 3.) This is both a gross misstatement of the thorough discussion, summary, and conclusions of Mr. Cohen's reporting (see: Opinion on Decision, Relevant Facts), appear s to ignore the discussion quoted above, and neglects to reflect the consideration below, all of which appeared in the original Opinion on Decision. On its face, the Applicant's assertion fails to recognize Finding of Fact 6, that "The Applicant has not rebutted the schedule rating," is a complete statement regarding the legal effect of Mr. Cohen's reporting. More completely, however, the following is adopted and incorporated from the Opinion on Decision:

> Mr. Cohen's opinion on the effect of Applicant's medication usage are not substantial evidence because they are not based upon medical evidence. Mr. Cohen's final conclusion that the Applicant is not amenable to rehabilitation relies entirely upon experience that individuals using pain medication "often experienced cognitive deficits, especially those related to focus and concentration. This often resulted in a diminished ability to learn and apply new job skills." (Applicant Exhibit 3, Page 3.) Based upon the effects off this medication, Mr. Cohen concludes the Applicant is not capable of benefiting from vocational retraining or returning to any work activities. (*Id*.) As Ms. Tincher notes, however, Mr. Cohen's conclusions regarding the effect of pain medications are not based upon any medical evidence. Instead, Mr. Cohen reaches his own conclusions about the effects of medication, which is a medical determination subject to the opinion of medical-

> legal-and not vocational-evaluators. The undersigned finds a vocational evaluator's role is simply to apply to work restrictions - including the effects of medication - imposed by medical evaluators in the case. See: *Fowler v. Wolfgang Puck Catering Events,* 2012 Cal. Wrk. Comp. P.D. LEXIS 622. The effect of medication must be left to a medical expert to provide comment on how such medication may result in work restrictions. A vocational evaluator cannot, however, independentlyreach such conclusions when not discussed by a medical evaluator. As Mr. Cohen's conclusions regarding the effect of medication are based entirely upon his speculation based upon his experience with other users of pain medication and not based upon the evidence presented by a medical evaluator in this matter, the undersigned concludes his opinion about the effect of medication on the Applicant's amenability to rehabilitation is not substantial evidence. (Opinion on Decision, Page 7.)

The Applicant's petition incorrectly asserts "The decision cites no basis for the applicant's failure to rebut the rating schedule." (Petition for Reconsideration, Page 3, Para. 8.) As is discussed in significant detail above, this assertion is wildly factually inaccurate. Further subverting the persuasiveness of the Applicant's position is the Applicant's failure to provide any citation to any provision within the Labor Code, a relevant regulation, or cite to any legal authority or analysis to support the Applicant's various assertions. As a result of these inaccuracies, misstatements, and assertions without legal support, the undersigned is not persuaded by the Applicant's argument.

CONCLUSION

As the Applicant's Petition for Reconsideration is based entirely on an inaccurate history, provides no legal support for the propositions contained therein, and is contradicted by persuasive legal authority, the undersigned recommends the Applicant's Petition for Reconsideration be denied.

Date: 1/21/2021

ANTHONY N. CORSO
Workers' Compensation Judge
Workers' Compensation Appeals Board