WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEFFREY RUSSELL, *Applicant*

vs.

COUNTY OF LOS ANGELES; Permissibly Self-Insured; administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ12319674
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We 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.

Applicant Jeffrey Russell filed a Petition for Reconsideration from the October 7, 2020 Findings, Award and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a battalion chief by the County of Los Angeles, sustained an industrial cumulative trauma injury in the form of colon cancer over the period June 16, 1980 through February 19, 2019, with last day worked being June 24, 2015. Applicant was found entitled to the presumption in Labor Code section 3212.1, and was awarded 66% permanent disability, after 34% apportionment to a prior award per Labor Code section 4664(c)(1). Applicant was awarded benefits equivalent to 399.25 weeks of indemnity payable at the rate of $290.00 per week, in the total sum of $115,782.50, payable commencing on February 27, 2020, less credit to defendant and less an attorney's fee of $17,367.38.

Applicant contests the WCJ's apportionment of his award, contending that defendant failed to establish what amount of previously awarded permanent disability should be the basis for apportionment to his prior award, and that he is therefore entitled to an award of 100% permanent disability for his colon cancer. Alternatively, applicant argues that if defendant did meet its burden, his injury "resulting in permanent total disability is immune from arbitrary reduction normally

mandated under Labor Code section 4664(c)(1)(G)." More specifically, applicant asserts that it cannot be determined from the record which amount of his prior award falls within the categories in Section 4664(c)(1)(G). Second, applicant asserts that defendant failed to establish the overlap between his prior permanent disability award and his current disability. Applicant also asserts that since his permanent total disability is based on a rebuttal of the scheduled rating of his disability, Section 4664(c)(1) should not be found applicable to reduce his award.

We have reviewed defendant's Answer to applicant's Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration, recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the WCJ's Report, and we have reviewed the record in this matter. As our Decision After Reconsideration, for the reasons discussed below, we will affirm the WCJ's determination.

FACTS

The parties stipulated that applicant sustained an industrial cumulative trauma injury in the form of colon cancer while he was employed as a battalion chief. The issues to be determined included whether applicant had rebutted the scheduled permanent disability rating to establish he is permanently totally disabled, per *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624], and the applicability of apportionment to prior awards per Labor Code section 4664(c). Regarding the later, the WCJ took judicial notice of two prior stipulated awards applicant received in 2019, in which the parties had listed the whole person impairment values assigned to each body part. Applicant was found to have sustained 100% permanent disability based on a rebuttal of the strict permanent disability rating.

Applicant previously received a joint award of 83% permanent disability, on January 31, 2019, for a cumulative trauma from June 16, 1980 through June 24, 2015 (ADJ10114138) for orthopedic injuries and injuries to the upper digestive tract, a skin disorder, dietary restrictions, bruxism, and TMJ. The second was a specific injury of June 25, 2015, regarding his skin condition (ADJ10358456).

The WCJ performed his own rating of the WPI values for applicant's prior awards of permanent disability. He calculated the permanent disability rating for the regions of the body that fell within the scope of the "catch-all" provision of Labor Code section 4664(c)(1)(G), which

includes "The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive."[1] He calculated applicant's prior permanent disability award for body parts that fall within Section 4664(c)(1)(G) to be 34%, and subtracted that from the 100% permanent disability for applicant's colon cancer.

DISCUSSION

Applicant contends defendant did not properly established the existence of the prior award of permanent disability, for purposes of determining whether Section 4664(c)(1) is applicable to reduce applicant's award of 100% permanent disability, and further, that defendant failed to establish the existence of overlapping disability.

In the *en banc* decision in *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440, the Appeals Board held that defendant must establish the existence of a prior award of permanent disability for the same region of the body. This may be established through judicial notice.

> The preferred procedure for establishing the existence of a prior permanent disability award is for the defendant to offer in evidence a copy of the award, or to request that the WCAB take judicial notice of a prior award. If, for some reason, a copy of the prior permanent disability award cannot be produced, then the existence of any prior permanent disability award may be shown by secondary evidence—*if the secondary evidence is sufficiently reliable and sufficiently establishes the substance of the lost or destroyed aw*ard. (See Evid.

---

[1] Labor Code section 4664(c)(1) provides:

> The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:
>
> (A) Hearing.
>
> (B) Vision.
>
> (C) Mental and behavioral disorders.
>
> (D) The spine.
>
> (E) The upper extremities, including the shoulders.
>
> (F) The lower extremities, including the hip joints.
>
> (G) **The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive**. (Emphasis added.)

> Code, § 1521; *Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059 [52 P.3d 79, 124 Cal. Rptr. 2d 142]; *Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222 [126 Cal. Rptr. 2d 509].) This opinion does not address what type(s) of secondary evidence might be used to establish the existence of a prior permanent disability award, but we will observe that the WCAB may draw reasonable inferences from any secondary evidence presented, if it is sufficiently reliable. (citations omitted.)
> *Sanchez v. County of Los Angeles*, 70 Cal. Comp. Cases 1440, 1451-1452. Emphasis in original.)

Here, the WCJ relied upon the parties' submission of the stipulated awards in applicant's 2019 settlement of his prior claims. The parties' stipulations included the WPI values for each relevant part of the body. The WCJ, recognizing his own competency to perform a permanent disability rating, found the rating to be correct and adopted the rating strings to establish the prior permanent disability ratings. We see no error in the WCJ's calculation that applicant had sustained 34% to the same region of the body as in the present case.

In *Sanchez, supra,* the Appeals Board addressed the issue of how to apportion under Labor Code section 4664, in a case where the injured worker had received a prior award of permanent disability for an injury to the lower extremities region of the body, as defined in section 4664(c)(1). The Appeals Board set out the analysis to determine whether to apportion to an overlapping disability for such an injury, noting the parties' respective burdens of proof. The Appeals Board held that a defendant is required to establish the existence of prior awards of permanent disability to the same region of the body. The permanent disability underlying any such awards is conclusively presumed to still exist, i.e., the applicant is not permitted to show medical rehabilitation from the disabling effects of the earlier industrial injury or injuries." (*Sanchez*, 70 Cal.Comp.Cases at 1442.) The lifetime 100% limitation on awards for any one region of the body applies even if there is no overlap.

> Section 4664(c)(1) provides that the accumulation of all permanent disability awards issued with respect to any one region of the body cannot exceed 100% over the employee's lifetime, except where the employee's disability is conclusively presumed to be total under section 4662. Thus, absent conclusively presumed total disability, the sum of the permanent disability awards for one body region cannot exceed 100%, *even where the permanent disability caused by the applicant's current injury does not overlap the permanent disability underlying his or her prior permanent disability award(s)*. (*Sanchez*, 70 Cal.Comp.Cases at 1457. Emphasis added.)

Subsequently, in *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229], the court held that when considering apportionment under Labor Code section 4664(b), the employer carries the burden to establish the existence of overlapping disabilities between the prior awards and the current injury. However, there is no issue of section 4664(b) apportionment here. Rather, the question here is whether defendant has established the existence of applicant's prior awards of permanent disability which affect the same region of the body as applicant's current injury. Upon a finding that defendant has done so, the amount of permanent disability applicant may receive in his lifetime for disabilities affecting each region of the body specified in section 4664(c)(1) is limited to 100%. Unless the new injury causes disability that is conclusively presumed to be total under section 4662, which is not applicable here, the sum of the permanent disability awards for any one body region cannot exceed 100%.

It is the application of the lifetime cap on the accumulation of more than 100% permanent disability for any one region of the body that applies here to limit applicant's recovery. Applicant's cumulative trauma injury here, and the prior stipulated awards of permanent disability, all fall within the catch-all provision in Section 4664(c)(1)(G). Within his lifetime, applicant cannot accumulate awards of permanent disability in excess of 100% permanent disability for injuries involving the "head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive."

As defendant has established that applicant has to date received awards for injuries to the same "region of the body," as defined in Section 4664(c)(1)(G), totaling 34% permanent disability, the most permanent disability he can receive in his lifetime for subsequent injuries to the same "region of the body" is 66%.

The issue of whether there is overlap between the prior and current permanent disability is not applicable where the 100% lifetime cap is reached. As noted in *Sanchez*, for purposes of section 4664(c)(1), the lifetime cap did not apply there since the current level of permanent disability was 7% and the prior permanent disability was 22%. The applicant there had accumulated a total of 29% permanent disability towards a lifetime cap of 100% for the lower extremities region as provided in section 4664(c)(1)(F).

In the case applicant cites to argue that the issue of overlap must be addressed, the facts did not bear out a finding that the permanent disability from the prior and current injuries were to the same regions of the body. In *Sturtevant Farms/State Compensation Insurance Fund v.*

Workers' Comp. Appeals Bd. (*Lopez*) (2019) 84 Cal.Comp.Cases 1010, the Board found the applicant's disability, as indicated in defendant's rating string, affected multiple body parts such as applicant's bladder function, and did not overlap the spine. Similarly, in *Varga v. City of Los Angeles*, 2019 Cal. Wrk. Comp. P.D. LEXIS 253, the Board upheld a WCJ's finding that the lifetime cap did not apply because defendant failed to establish the amount of the prior permanent disability award was for the same region of the body.

However, in *McGowan v. City of Los Angeles* (2015 Cal Wrk Comp PD LEXIS 24), the panel affirmed the application of the lifetime cap based on adding the permanent disability from two prior awards, injury to the heart, and cancer of the bladder, where the applicant argued that the lifetime cap was inapplicable due to the absence of overlap between the prior and his current award for recurrent bladder cancer. The panel adopted the WCJ's Report, which noted that applicant asserted that including the heart and bladder as one region of the body was inherently unfair despite the statutory language. The WCJ and the panel rejected applicant's argument that the prior awards should have been combined rather than added together, which would have lowered the award, to calculate the amount of the prior awards to be deducted from the current award.

Applicant further argues that applying apportionment under Section 4664(c)(1)(G) for prior awards of permanent disability should not apply to cases in which 100% permanent disability is established by way of rebuttal of a scheduled rating through vocational evidence. Applicant asserts that apportioning an award of 100% permanent disability by application of Section 4664(c)(1)(G) "is so impressively inequitable it should be dismissed outright," because a rating obtained per *LeBoeuf* is intended to compensate individuals who have a catastrophic earning loss. He argues that to reduce that award because of a "non-overlapping, unrelated prior injury" is contrary to the purposes of allowing a departure from the strict AMA guide permanent disability rating.

Applicant has not cited to any controlling authority that would preclude application of Section 4664(c)(1)(G) to awards of permanent disability that are based on a rebuttal of a strict scheduled rating. As noted in defendant's Answer, to ignore the statutory requirement in Section 4664(c)(1)(G) to limit the accumulation of permanent disability for the same region of the body to 100%, would result in applicant receiving a 2nd life pension, after his prior award of 83% permanent disability for injuries that include the same region of the body as in the present case.

Accordingly, as our Decision After Reconsideration, we will affirm the WCJ's Findings, Award and Order, awarding applicant 66% permanent disability after apportionment per Labor Code section 4664(c)(1)(G).

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 7, 2020 Findings, Award and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 9, 2021

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

JEFFREY RUSSELL
STRAUSSNER SHERMAN
LAW OFFICES OF DANIEL J. DONAHUE

SV/*pc*

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