WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KAREN WONG, *Applicant*

vs.

COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT; SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ11339126
Van Nuys 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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 1, 2023

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

KAREN WONG
STRAUSSNER, SHERMAN LONNÉ TREGER & HELQUIST
HOMAN, STONE & ROSSI

AS/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

Defendant County of Los Angeles has filed a timely, verified petition for reconsideration of the Findings and Award dated September 29, 2023, which found that applicant, Karen Wong, while employed on March 11, 2018 as a deputy sheriff, Occupational Group Number 490, at Los Angeles, California, by the County of Los Angeles, sustained injury arising out of and in the course of employment to her cervical spine, lumbar spine, left shoulder, left knee, left hand and index finger, with cerebral concussion, posttraumatic headaches, sleep disturbance, compartment syndrome of the left lower limb, bruxism, myositis, and trauma to her teeth and jaws, resulting in permanent, total disability.

Deputy Sheriff Wong was 46 years old when a drunk driver being pursued by the California Highway Patrol drove into her patrol vehicle head-on at a speed of 110 miles per hour. The drunk driver was killed, but Ms. Wong survived despite being so severely crushed inside her vehicle that it took emergency personnel more than three hours to remove her using the jaws of life. Ms. Wong was released after spending five days in the hospital, but she is now medically retired and has not returned to any kind of work since her injury.

Defendants' petition contends generally that the undersigned acted without or in excess of its powers in finding and awarding permanent, total disability, that the evidence does not justify the findings of fact, and that the findings of fact do not support the decision. The petition also contends that the undersigned's decision will result in significant prejudice and irreparable harm to defendant, although these last two assertions seem misplaced as they are criteria for removal of interlocutory and downstairs, repetitive bending, stooping, and lifting," "no turning her head and neck from side to side, no flexing and extending the neck," "no lifting above the head," "no repeated bending, lifting, twisting, or lifting more than five pounds," and "avoiding completely" any "repetitive typing, keyboard activities for a computer" and "fine manipulation avoidance" (AME Report of Dr. Segil dated March 31, 2021, Court's X3, page 1, paragraph 3, through page 2, paragraph 3).

The petition further contends that the fact that Deputy Wong has written short stories and poetry means that she is amenable to vocational rehabilitation and could produce income.

Finally, the petition asserts that surveillance videos showing Deputy Wong driving a truck, shopping, moving bags and boxes, and riding as a passenger on a motorcycle "are substantial evidence" and "are significant to rebut the finding of the 100% PD" (Petition for Reconsideration dated October 25, 2023, page 8, numbered lines 25-27).

Applicant's counsel has not yet filed an answer to the petition but is expected to do so.

II

FACTS

Based on the stipulations of the parties at trial, it was found that applicant, Karen Wong, while employed on March 11, 2018, at age 46, as a deputy sheriff, Occupational Group Number 490, at Los Angeles, California, by the County of Los Angeles, sustained injury arising out of and in the course of employment to her cervical spine, lumbar spine, left shoulder, left knee, left hand and index finger, with cerebral concussion, posttraumatic headaches, sleep disturbance, compartment syndrome of the left lower limb, bruxism, myositis, and trauma to teeth and jaws (Minutes of Hearing and Summary of Evidence dated 7/27/2023, page 2, paragraph 1).

The parties further stipulated that at the time of injury, the employer was permissibly self-insured, and at the time of injury, the employee's earnings were $1,878.71 per week, warranting indemnity rates per code for temporary and permanent disability (*Id*., paragraphs 2 and 3). The parties additionally stipulated that the employer has paid compensation as follows: temporary total disability (TTD) as Labor Code§ 4850 benefits for the period of March 12, 2018 to March 11, 2019; TTD benefits at the rate of$1,215.27 per week for the period of March 12, 2019 to March 8, 2020; and permanent disability (PD) at the weekly rate of $290 for the period of September 21, 2021 to April 27, 2023 or according to proof. The parties also stipulated that the employee has been adequately compensated for all periods of temporary disability (TD) claimed through March 8, 2020 (Id., para. 4).

The only issues submitted for decision at trial were permanent disability, need for further medical treatment, and attorney fees. The parties also raised three additional issues, ancillary to the issue of permanent disability: whether permanent disability is total, and whether defendant's vocational expert, and applicant's vocational expert, provided substantial evidence on the issue of whether applicant sustained permanent total disability.

The AME reports of Clive Segil, M.D. in orthopedics, Lawrence Richman, M.D. in neurology, and Burton Sobelman, D.D.S. in dentistry were converted into a combined permanent disability (PD) percentage by using Labor Code Section 4660.1 and the current rating schedule to adjust Whole Person Impairment (WPI) percentages from the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides) found by the AMEs for each body part into PD, and then combining all PD percentages on the rating schedule's Combined Values Chart (denoted by the letter "C" below) in the manner directed by the rating schedule, as shown in the following rating strings:

13.07.04.00-5-[xl.4]7-490I-I-10-11% WPI, headaches (trigeminal nerve)
15.01.0l.00-8-[xl.4]11-4901-l6-17% PD, cervical
15.03.01.00-8-[x 1.4] 11-4901-16-17% PD, lumbar
16.01.04.00-18-[x 1.4]25-4901-33-35% PD, left hand (grip)
16.02.01.00-4-[x1.4]6-4901-7-8% PD, left shoulder
17.05.0l.00-6-[xl.4]8-4901-9-10% PD, left knee
Left upper extremity: 35 C 8 = 40

40 C 17 C 17 C 11 C 10 C 8 = 71 % PD combined

According to the AMEs, 100% of this PD was caused by applicant's injury of March 11, 2018. Thus, a PD rating based strictly on Labor Code Section 4660.1, the AMA Guides, and the rating schedule is 71% PD. This, however, was found to be rebutted by the opinions of vocational expert Enrique Vega, whose. reports were admitted into evidence as Applicant's 2 through 5, and whose deposition transcript was admitted as Joint 1. Mr. Vega concluded that in this case, based on vocational testing and a review of all records, applicant Karen Wong is not feasible for vocational rehabilitation. This vocational opinion of Mr. Vega was found to be more persuasive in its reasoning than the opinions of the other vocational expert, Nick Corso. The opinions of Mr. Vega were found to be based on a more thorough examination and testing, and more accurate in connecting the medical opinions of the AMEs with his conclusions than the opinions of Mr. Corso. It was found that Mr. Vega's opinions in this case constitute substantial evidence, whereas Mr. Corso's opinions do not. Unlike Mr. Corso, Mr. Vega performed vocational testing and met in person with Ms. Wong. More importantly, Mr. Vega correctly accounted for all of the AMEs' work restrictions, which Mr. Corso misinterpreted and disregarded.

Based on AMEs Dr. Segil, Dr. Richman, and Dr. Sobelman, it was found that further medical care will be required to cure or relieve the effects of applicant Karen Wong's injury of March 11, 2018. Based on the criteria for determining attorney fees set forth in California Labor

Code Sections 4903 and 4906(d), California Code of Regulations, Title 8, Section 10844, and WCAB Policy and Procedure Manual Index No. 1.140, it was found that the reasonable value of the services of applicant's attorneys of record with respect to the findings and award in case number ADJ!5573862 is equal to 15% of the accrued permanent disability plus 15% of the present value of future permanent disability, with the fees to be commuted from the side of the award of PD.

Defendant County of Los Angeles filed a timely, verified petition for reconsideration of the finding and award of permanent, total disability, the contentions of which are summarized in the introduction above. Each of those contentions is addressed in the discussion below.

III

DISCUSSION

A. The evidence does justify the finding and award of permanent, total disability.

In the case of *Dept. of Corrections & Rehabilitation v. W.C.A.B.* (*Fitzpatrick*) (2018) 27 Cal. App. 5th 607, 238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 1680, the Third District Court of Appeal held that a finding of permanent, total disability cannot be found solely "in accordance with the fact" under California Labor Code Section 4662(6) without following the more specific and detailed framework of Labor Code Section 4660 (which applies to injuries before January 1, 2013; for injuries after that date, such as the instant case, the applicable section would be 4660.1). This approach is necessary in order to give effect to the legislature's intent to provide a system that is objective and uniform in application, with consistency, uniformity, and objectivity in its results. At the same time, the court in Fitzpatrick acknowledged that it is possible to rebut a rating that is calculated using the AMA Guides and the current rating schedule in accordance with Labor Code Section 4660 (or 4660.1).

The case of *Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal.App.4th 1262, 1269, 129 Cal. Rptr. 3d 704 described three methods for rebutting a scheduled rating: (1) by showing a factual error in the application of a formula or the preparation of the rating schedule; (2) when the injury impairs rehabilitation, causing diminished future earning capacity greater than reflected in the scheduled rating (as in *LeBoeuf. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 234); or (3) where the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor.

In the present case, it was found that while the medical expert opinions establish that Ms. Wong has 71 % permanent disability, the vocational expert opinion of Enrique Vega establishes diminished future earning capacity greater than reflected in the scheduled rating, due to her lack of amenability to vocational rehabilitation as explained in *LeBoeuf v. Workers' Comp. Appeals Bd.*, and the opinion of Nick Corso fails to establish otherwise. The opinions of the AMEs are entitled to great weight due to their presumed expertise and neutrality as mutually-selected medical experts (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal. Comp. Cases 114]), and this includes their work restrictions, which were correctly followed by vocational expert Enrique Vega, and misinterpreted by Mr. Corso, as further explained below. Mr. Vega furthermore performed vocational testing, whereas Mr. Corso did not. Most importantly, Mr. Vega persuasively explained how and why applicant Karen Wong is not feasible for vocational rehabilitation:

> "Ms. Wong struggled to perform simple physical tasks in a controlled testing environment. She exhibited serious problems with pain and physical limitations that negatively impacted her work pace and concentration. She alternated between sitting and standing positions throughout testing. She constantly shifted around in her chair while seated. Ms. Wong had difficulty completing manual tasks. She needs to sit straight to alleviate her back pain and neck pain. The results of testing suggest that Ms. Wong's physical limitations and pain would prevent her from maintaining a competitive work pace or meeting work deadlines. Based on the evidence in this case, I find that Ms. Wong is not feasible for vocational rehabilitation services."

(Vocational Expert Report of Enrique Vega dated April 14, 2022, Applicant's 2, at page 14, lines 11-18.) The vocational expert opinions of Mr. Vega justify the award of permanent total disability under the second method of rebuttal described in *Ogilvie*, cited above.

The medical apportionment opinions of the AMEs attribute 100% of all PD to applicant's injury of March 11, 2018, so no there are no "vocational apportionment" issues as described in the recent Appeals Board en bane opinions in the case of *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal. Comp. Cases 741 (*Nunes I*) and 88 Cal. Comp. Cases 894 *(Nunes II*, denying reconsideration of *Nunes I*). Because "no evaluating physician has identified medical apportionment, a vocational expert is not authorized to interpose an independent apportionment analysis" in this case (*Nunes II*, supra, 88 Cal. Comp. Cases 894, 898).

B. The vocational expert opinions of Mr. Vega constitute substantial medical evidence, and the vocational expert opinions of Mr. Corso do not

Substantial medical evidence must not be speculative and must be based on pertinent facts and on an adequate examination and history (*Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 621). Substantial vocational evidence is no different, and only Mr. Vega's vocational expert report offers an examination that included vocational testing and an analysis that correctly followed the work restrictions of AME Dr. Segil. Accordingly, the opinions of Mr. Vega, and not Mr. Corso, were followed in this case, and the opinions of Mr. Vega were found to constitute substantial medical evidence.

Mr. Vega, whose reports were admitted into evidence as Applicant's 2 through 5, and whose deposition transcript was admitted as Joint 1, concluded that in this case, based on his vocational testing and a review of all records. This is not merely an assertion by Mr. Vega; it is a conclusion that is supported by the work restrictions of the AMEs, Mr. Vega's observations, and cogent reasoning. Mr. Vega observed and tested Ms. Wong, and explained that she is not feasible for vocational rehabilitation because she struggled to perform simple physical tasks in a controlled testing environment, exhibited serious problems with pain and physical limitations that negatively impacted her work pace and concentration, alternated between sitting and standing positions throughout testing, and constantly shifted around in her chair while seated. Mr. Vega noted that Ms. Wong had difficulty completing manual tasks and needs to sit straight to alleviate her back pain and neck pain. Despite Ms. Wong's apparent mobility, Mr. Vega's testing revealed physical limitations and pain that would prevent her from maintaining a competitive work pace or meeting work deadlines. Accordingly, Mr. Vega found that Ms. Wong is not feasible for vocational rehabilitation services (Vocational expert report of Enrique Vega dated April 14, 2022, Applicant's 2, at page 14, 1ines 11-18). Mr. Corso's ability to observe Ms. Wong was limited by the fact that he did not perform any vocational testing and only saw her in a 90-minute Zoom meeting, where he observed that she had to stand and stretch at about 20-minute intervals (Vocational expert report of Nick Corso dated October 17, 2022, Defendant's A, at page I 0, last two paragraphs, through page 11, first paragraph 1ines 11-18, and page 18, second paragraph).

Because the vocational opinions of Mr. Vega are more persuasive in their reasoning, based on a more thorough examination and testing, and more accurate in connecting the medical opinions with his conclusions than the opinions of the other vocational expert, Nick Corso, it was found that

Mr. Vega's opinions in this case constitute substantial evidence, whereas Mr. Corso's opinions do not. Unlike Mr. Corso, Mr. Vega performed vocational testing and met in person with Ms. Wong. More importantly, Mr. Vega correctly accounted for all of the AMEs' work restrictions, which Mr. Corso misinterpreted and seemed to disregard with respect to the number of hours of work permitted.

Mr. Corso, whose reports were admitted as Defendant's A, B, and C, concludes that applicant "is amenable to vocational rehabilitation" and "is able to perform pa1t- or full-time work within her limitations" (Vocational Expert Report of Nick Corso dated October 17, 2022, Defendant's A, at page 54, lines 2-4). This conclusion completely disregards the work restrictions provided by orthopedic AME Dr. Segil, which include, among many other things, a limitation to working only two hours per day "with rest periods of five minutes every hour, depending on the type of work" (March 31, 2021, Court's X3, at page 1, lines 6-8). Mr. Corso chooses to disregard the AME's restriction to working two hours per day and assumes that the AME meant that Ms. Wong could in fact work more than two hours per day "depending on the type of work." In addition to speculating regarding what "type of work" the AME thought Ms. Wong could or should do for more than two hours per clay, Mr. Corso misses the more obvious and probable interpretation that Dr. Segil intended the phrase "depending on the type of work" to refer to the clause immediately preceding it, about the frequency and duration of rest periods.

Defendant's assertion that Mr. Corso's opinions are substantial does not make them so. The conclusions of Mr. Vega regarding Ms. Wong's vocational feasibility are better reasoned, based on a more accurate application of the AMEs' opinions, and based on a better vocational examination than the conclusions of Mr. Corso.

C. The argument that Ms. Wong can perform sedentary work within AME Dr. Segil's restrictions is unpersuasive

As explained above, the opinions of the AMEs, including the work restrictions of AME Dr. Segil, are entitled to great weight due to their presumed expertise and neutrality as mutually-selected medical experts (See *Power*, cited supra). Also explained above is how those work restrictions, which included "working only two hours a day" (AME Report of Dr. Segil dated March 31, 2021, Court's X3, page 1, paragraph 3, line 3), were misinterpreted by Mr. Corso as allowing more than two hours per day of work in a pa1t-time or even a full-time sedentary position.

Defendant's petition argues that the AME's limitation to "working only two hours a day" is only for both knees, but the AME does not place any qualifier upon the word "working" to suggest that applicant can use other parts of her body to work for longer periods of time. Furthermore, when taken together with all of Dr. Segil's other work restrictions, it is clear that most if not all sedentary work not involving the knees would be exceeded by the other restrictions, such as completely avoiding repetitive typing and keyboard activities, avoiding fine manipulation, and not turning the head or neck (AME Report of Dr. Segil dated March 31, 2021, Court's X3, page 1, paragraph 3, through page 2, paragraph 3). Accordingly, the contention of defendant that applicant could be performing sedentary work, or the conjecture that things could change to allow her eventual employment, is found to be highly unpersuasive. Considering the opinions and observations of vocational expert Mr. Vega, the opposite conclusion seems more probable, that Ms. Wong is not amenable to employment or rehabilitation, even considering sedentary jobs.

D. Ms. Wong's creative writing hobby does not rebut evidence of permanent total disability

Even less persuasive and more speculative than the argument that applicant could perform or be rehabilitated to sedentary work is the contention that her ability to write poems and creative fiction makes her amenable to rehabilitation. The ability to write a poem, or a short story, or even hundreds of them over time, does not equate to vocational feasibility. As persuasively explained by vocational expe1t Mr. Vega at his deposition, even "freelance work"-which may not constitute employment-cannot escape the need to maintain a pace and be consistently productive enough to meet deadlines and to produce substantial and gainful earnings (Deposition of Enrique Vega, Joint 1, page 21, line 16 to page 23, line 15). Mr. Vega's observation that Ms. Wong needed to lie down after an hour or two of activity in his office is consistent with the prophylactic work restriction of AME Dr. Segil to "working only two hours a day" (Deposition of Enrique Vega, Joint I, page 22, line 23 to page 23, line 2; AME Report of Dr. Segil dated March 31, 2021, Court's X3, page 1, paragraph 3, line 3). Ms. Wong's ability to engage in creative writing at her own initiative does not persuasively prove vocational feasibility, nor rebut evidence of permanent, total disability as explained above.

E. The surveillance videos do not rebut evidence of permanent total disability

The surveillance videos described in defendant's petition were not admitted into evidence but were reviewed by both vocational experts to see whether Ms. Wong's activities driving a truck, shopping, moving containers, washing things with a hose, and riding as a passenger on a motorcycle would change their opinions regarding vocational feasibility. Predictably, the experts did not change their opinions as a result of reviewing the surveillance videos.

Defense expert Mr. Corso finds that the videos support his conclusion that Ms. Wong can benefit vocational rehabilitation or perform "suitable part-or full-time work if so interested" (Vocational expert report of Nick Corso dated June 13, 2023, page 8, last paragraph). Mr. Corso also believes, and defendant's petition argues, that Ms. Wong's activities in these videos are inconsistent with the limitations reported by both her doctors and Ms. Wong herself.

Defendant's argument and Mr. Corso's interpretation of the subrosa videos miss the distinction between actual and prophylactic work restrictions. When AME Dr. Segil provided his restrictions such as no lifting over five pounds and limiting working to only two hours per day, it seems clear that he was not describing what Ms. Wong can or cannot do, but rather what she should or should not do on a prophylactic basis. When Ms. Wong herself reports that she "can" only lift five pounds , or has problems with stairs, squatting, bending, and so forth it seems to be equally clear that she is reporting what she is allowed to do per her doctors' orders, or sensibly should do, regardless of what she could do (and probably regret later) if motivated to exceed these restrictions under exceptional circumstances.

Applicant's vocational expert, Mr. Vega, acknowledges that while the activities shown in surveillance videos may or may not exceed her orthopedic work restrictions, Mr. Corso is mistaken to regard these videos as a reliable source of evidence regarding employability:

> Mr. Corso fails to realize that [the surveillance] does not indicate an ability to perform these activities on a consistent basis or under timed constraints as is required for employment. Ms. Wong explained to me in our follow-up interview that while she can drive and walk, her problems stem from her head injury such as experiencing fatigue and headaches. Furthermore, her energy levels fluctuate on a day-to-day basis and there are days when she does not have energy to do basic activities. Mr. Corso (and the viewer) has no way to know the aftermath of Ms. Wong's actions after what is observed in the sub- rosa videos. There is no way to tell if she suffered any consequences such as pain and fatigue afterwards, or if she is unable to complete simple tasks in the following days. These sub-rosa videos are a snapshot of an individual's life and cannot be

> reliably used to extrapolate how they would function in an employment setting. Thus, Mr. Corso's opinion that Ms. Wong is not severely disabled based on a few sub-rosa videos has no merit and should not be afforded any weight.

(Vocational Expert Report of Enrique Vega dated July 24, 2023, Applicant's 5, at page 16, paragraph 3.) Mr. Vega's interpretation of the surveillance videos is more credible and persuasive than Mr. Corso's interpretation, which assumes that activities, which were likely exceptional in nature, somehow prove vocational feasibility.

Defendant's petition for reconsideration requests that the record be developed by having AMEs Dr. Segil and Dr. Richman view the surveillance videos to see whether they might change their work restrictions. Although it is true that the vocational experts necessarily defer to the AMEs on such issues as work restrictions, in this case it does not appear necessary to take the additional step of having the AMEs review subrosa videos, because Ms. Wong's work restrictions are clearly prophylactic in nature and are not intended to be descriptive of her ability to perform a non-work related act on a one-time basis. There is no reason to believe that the AMEs would alter their prophylactic recommendations based on occasional activity, the exact nature of which is unclear because the surveillance videos were not directly offered into evidence at trial.

IV

RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

DATE: 11/06/2023

Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE