WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDRE FLORES, ***Applicant***

vs.

CALIFORNIA DEPARTMENT OF TRANSPORTATION, LEGALLY UNINSURED; STATE COMPENSATION INSURANCE FUND, STATE CONTRACT SERVICES, ***Defendants***

Adjudication Number: ADJ15347791
Santa Barbara District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the December 11, 2023 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed on April 16, 2020, sustained industrial injury to the thoracic spine, lumbar spine, cervical spine, right ankle, and right elbow. The WCJ found that applicant was permanently and totally disabled as a result of his injury, and that there was no basis for apportionment.

Defendant contends that its Petition for Reconsideration (Petition) is timely; that the apportionment described by the QME was valid; that the QME did not possess the necessary vocational expertise to opine as to applicant's ability to reenter the labor market; that the QME did not endorse applicant's inability to return to the labor market; and that applicant's vocational expert reporting is not substantial evidence because it applies an incorrect legal standard and failed to account for prior injuries.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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 discussed below, we will deny the Petition.

FACTS

Applicant claimed injury to his thoracic spine, lumbar spine, right ankle, and right elbow while employed as an Equipment Operator II by defendant California Department of Transportation on April 16, 2020. Defendant admits the injury arose out of and in the course of employment but contests the nature and extent of the injury.

The parties have selected Michael Tooke, M.D., to act as the Qualified Medical Evaluator (QME). The parties have also obtained vocational expert reporting from P. Steve Ramirez, for the applicant, and Scott Simon, for the defendant.

On September 12, 2023, the parties proceeded to trial and framed issues, in relevant part, of permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence (Minutes), dated September 12, 2023, at 2:6.)

On December 11, 2023, the WCJ issued his F&A, determining in relevant part that applicant had sustained permanent and total disability without apportionment. (Findings of Fact Nos. 8 & 9.) In his accompanying Opinion on Decision, the WCJ explained that his finding of permanent disability relied on the determination of applicant's vocational expert Mr. Ramirez, who determined that applicant was unable to compete in the open labor market. (Opinion on Decision, at p. 1.) The WCJ further noted that the QME had similarly opined that applicant would not foreseeably return to gainful employment in the open labor market. (*Ibid*.) With respect to apportionment, the WCJ observed that Dr. Tooke failed to adequately explicate the basis for his apportionment opinion and did not state his opinions to a reasonable medical probability.

Defendant's Petition avers it was timely filed on January 29, 2024 because defendant first received the award on January 12, 2024. (Petition, at p. 2:2.) Defendant also contends the opinions of applicant's vocational expert are not supported in the evidentiary record and apply an incorrect legal standard. (Petition, at p. 11:2.) Defendant further submits that the apportionment analysis of the QME is based on substantial evidence and is not appropriately accounted for by applicant's vocational expert.

Applicant's Answer avers the apportionment analysis of the QME is not substantial evidence because it fails to provide pertinent facts or adequate reasoning to support its conclusion. (Answer, at p. 7:15.) Applicant also contends the finding of permanent and total disability is supported in the medical evidence and the vocational reporting.

DISCUSSION

We begin our discussion by addressing the timeliness of the Petition. Pursuant to Labor Code[1] section 5903, "[a]t any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration…." (Lab. Code, § 5903.) The time for filing may be extended five (5) days for mailing. (Code of Civ. Proc., §1013; WCAB Rule 10605(a)(1).) The time limit for filing a petition for reconsideration is jurisdictional so that the Board lacks the power to grant an untimely petition. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171 [260 Cal.Rptr. 76]; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979 [46 Cal.Comp.Cases 1008].)

Here, the F&A indicates service via email on applicant's counsel and defendant on December 11, 2023. (F&A, p. 2.) However, pursuant to defendant's verified Petition, the Award was not received by State Compensation Insurance Fund (SCIF) until served by applicant's counsel on January 11, 2024. (Petition, at p. 2:11.) Defendant's Petition further avers that defense counsel spoke with applicant's counsel on January 12, 2024, and that applicant's counsel confirmed their office did not receive the F&A in December, 2023. (Petition, at p. 2:20.) Rather, applicant's counsel downloaded the decision directly from the Electronic Adjudication Management System (EAMS) filenet and subsequently served the decision on defendant on or about January 11, 2024.

We also note that applicant's Answer to the Petition does not raise the issue of the timeliness of defendant's Petition, nor does applicant contest defendant's characterization of the discussion between counsel regarding when the F&A was received and served by applicant's counsel.

[1] All further references are to the Labor Code unless otherwise noted.

Based on the above, we conclude that the first date for which we can establish service of the decision on defendant is January 11, 2024. Because defendant's January 29, 2024 Petition was filed within 20 days of service of the F&A, the petition is timely, and we will consider the Petition on the merits.

We next turn to the issue of apportionment. The WCJ's decision finds no legal basis for apportionment. (Finding of Fact No. 9.) The Opinion on Decision explains that QME "Dr. Tooke failed to explain how or why the 10% apportionment impacted on Applicant and further couched his language with the word, 'I think', which does not constitute substantial medical evidence on the issue of apportionment." (Opinion on Decision, at p. 2.) The WCJ amplified his analysis in the Report, as follows:

> In his July 19, 2021, medical report, Dr. Tooke wrote as follows,
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> > "There is a finite probability of the applicant's developing symptoms, impairment, and disability attributable to the lumbar spine, based solely on the pre-injury age-related and congenital findings revealed on the MRI scan, in the absence of any injury, occupational or otherwise. Apportionment of causation is medically probably 10% to the pre-existing condition and 90% to the specific injury."
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> Dr. Tooke apportioned 10% of Applicant's permanent disability based on degenerative disc disease. He never explains how or why that contributed to Applicant's disability [i]n his deposition, taken on December 9, 2022, he opined on page 15 and continuing on page 16, the basis for his apportionment determination. He ultimately concluded,
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> > "So what I am saying is absent this injury, which I think was - - there's a - - as I have explained involved a dissipation of quite a lot of force when this large man feel to the ground. I think absent that significant injury, that we wouldn't be - - this case wouldn't have happened. He wouldn't have had an injury. He wouldn't have required medical investigation or treatment, and he wouldn't be disabled. At least I think there's a 90 percent chance that's the case. That is why I apportioned 90 percent to the injury."
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> This opinion does not constitute substantial medical evidence and cannot be relied upon as Dr. Tooke's opinion on apportionment is not premised on reasonable medical probability but as phrased as above, "At least I think there's a 90% chance…" The doctor has failed to properly opine on apportionment and Defendant has failed in their burden on apportionment.
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> (Report, at pp. 2-3.)

Defendant's Petition avers that the QME's usage of the term "I think" was synonymous for "It is my opinion…." (Petition, at p. 5:22.) Defendant further notes that Dr. Tooke's estimate of apportionment was based on diagnostic studies which demonstrated congenital stenosis and other findings, and that the combination of industrial injury and applicant's preexisting pathology resulted in the current disability. (Petition, at p. 6:19.) The QME thus appropriately estimated the approximate percentages of both factors, with applicant's "anatomical factor" accounting for 10 percent causation of applicant's permanent disability. (*Id.* at p. 7:4.)

However, following our review of the record, we agree with the WCJ's assessment that the apportionment opinions of the QME do not constitute substantial evidence.

The QME's July 19, 2021 Report describes apportionment based on a "finite probability" that the applicant would develop symptoms absent industrial injury. (Ex. F, Medical report of Michael Tooke, M.D. in the capacity of PQME dated July 19th, 2021, p. 3.) However, it is not clear from the report what the import of the "finite probability" is in the context of the physician's apportionment analysis. The QME concludes that 10 percent of "causation" is attributable to the pre-existing condition. However, the opinion does not explain which pre-existing condition the QME is referencing, i.e., whether age-related or congenital pathology is the identified factor of apportionment. Nor does the QME explain how he arrived at his estimated figure of 10 percent, or whether his "[a]pportionment of causation" analysis addresses causation of the injury or of permanent disability. (Lab. Code, § 4663(a).)

The QME's deposition testimony does not clarify the analysis. The QME testified that there is a 90 percent chance that "absent that significant injury … [applicant] wouldn't have had an injury … [requiring] medical investigation or treatment, and he wouldn't be disabled." (Ex. 10, Transcript of the Deposition of Michael Tooke, M.D., dated December 9, 2022, at p. 16:9.) The QME thus discusses the relationship between applicant's April 16, 2020 industrial injury and the resulting permanent disability, but offers no further insight into *how* and *why* applicant's *age-related degenerative condition* was responsible for 10 percent of applicant's residual permanent disability. (See *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 751 [2023 Cal. Wrk. Comp. LEXIS 30] (Appeals Board en banc) (*Nunes I*); *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. LEXIS 46] (*Nunes II*); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*).)

The QME's discussion of apportionment is thus non-specific as to the exact factors of nonindustrial apportionment, how and why each factor is presently resulting in permanent disability, and how the physician arrived at the particular percentages of causation of disability. Accordingly, the QME's analysis fails to explain "what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Lab. Code, § 4663(c).) We therefore concur with the WCJ's determination apportionment is not supported in the evidentiary record. (Finding of Fact No. 9.)

Defendant further contends that the WCJ erred in determining that applicant sustained permanent and total disability by relying on the opinions of applicant's vocational expert that applicant could not return to gainful employment in the open labor market. Defendant contends that applicant's vocational expert failed to apply nonindustrial apportionment as required by section 4663(c) and *Nunes I, supra*, 88 Cal.Comp.Cases 741.

In *Nunes I*, we held that section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, and that the Labor Code makes no statutory provision for "vocational apportionment." (*Id.* at pp. 743-744.) We further held that while vocational evidence may be used to address issues relevant to the determination of permanent disability, vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

Here, applicant's vocational expert Steve Ramirez has opined that applicant is not amenable to vocational rehabilitation and has therefore experienced a 100 percent loss of earning capacity. (Ex. 1, Report of P. Steve Ramirez, dated February 1, 2022, at p. 15.) In supplemental reporting dated July 7, 2023, Mr. Ramirez further observes that:

> As stated in my previous report, the actual work restrictions assigned by Dr. Tooke preclude Mr. Flores from lifting/carrying more than 15 pounds, contemplating sedentary work and a reduced portion of light work. However, when consideration is given to the fact Mr. Flores is precluded from sitting/standing or walking for more than 30 minutes continuously before needing to change positions, from a vocational perspective these restrictions have dire implications on Mr. Flores' ability to sustain competitive employment. Dr. Tooke, in his report dated 07/20/2022 referred to my report and stated, "I

> find no significant inconsistencies between my own QME and the above report. I concur that realistically the applicant's impairments and/or disabilities preclude his finding work which he could perform in the open labor market." In his deposition dated 12/02/2022 he stated he has no reason to change his opinion concerning my vocational conclusion regarding ability to return to employment.
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> (Ex. 11, Report of P. Steve Ramirez, dated July 7, 2023, at p. 3.)

Mr. Ramirez further acknowledged our en banc opinion in *Nunes, supra*, 88 Cal.Comp.Cases 741, where we held that vocational reporting addressing apportionment "requires an evaluation of all factors of apportionment, so long as they are otherwise supported by substantial medical evidence, and irrespective of whether they were the result of pathology, asymptomatic prior conditions, or whether those factors manifested in diminished earnings, work restrictions, or an inability to perform job duties." (*Nunes I, supra*, at p. 754.) Despite the necessity for a full explication of each factor of apportionment, Mr. Ramirez addresses the issue in a single sentence, averring "[i]t is my professional opinion from a vocational perspective, 90% of Mr. Flores industrial lumbar injury and chronic pain synergistically results in Mr. Flores being 100% vocationally disabled." (*Ibid.)*

Defendant's Petition observes that Mr. Ramirez' analysis of apportionment is inconsistent with *Nunes I* because it fails to substantively address the factors of apportionment identified by the evaluating physician, and that the vocational expert's reliance on "synergy" is inapposite. (Petition, at p. 12:9.)

However, our decision in *Nunes II, supra*, made clear that "if an evaluating physician identifies apportionment, but the WCJ determines that the apportionment analysis does not constitute substantial evidence and that development of the record is not otherwise warranted, applicant is entitled to an unapportioned award." (*Nunes II, supra*, 88 Cal.Comp.Cases at pp. 897-898].)

Here, the WCJ has determined that the applicant has sustained permanent and total disability as a result of his industrial injury, and that the apportionment analysis of the QME is not substantial evidence. (Finding of Fact No. 9, Opinion on Decision at pp. 1-2.) Thus, and irrespective of the vocational expert's discussion of apportionment in his July 7, 2023 supplemental reporting, there is no valid apportionment identified in the record. Accordingly, we concur with the WCJ's determination that applicant is entitled to an unapportioned award. (Finding of Fact No. 9; *Nunes II, supra*, 88 Cal.Comp.Cases at pp. 897 ["[i]t is axiomatic that in those

instances where the WCJ determines that no evaluating physician has identified valid legal apportionment, applicant is entitled to an unapportioned award"].)

Finally, we address defendant's contention that the vocational expert reporting is not substantial evidence because it relies on an inaccurate medical history, and specifically, because it fails to factor applicant's pre-existing work restrictions into the overarching vocational analysis. (Petition, at p. 13:4.) However, to the extent that defendant argues that applicant's current disability was caused in whole or in part by prior injuries, this is an issue of apportionment that must be addressed by the evaluating physician in the first instance. (Lab. Code, § 4663(c); *Nunes I, supra*, at p. 748.) Here, the QME did not apportion to prior injuries, and defendant did not challenge the apportionment findings of the QME, or specifically address the import of applicant's prior work restrictions to the QME's apportionment analysis. (Ex. F, Medical report of Michael Tooke, M.D., dated July 19, 2021, at p. 3.) Nor has defendant offered applicant's prior awards and their associated medical reports into evidence in support of this argument. Accordingly, we discern no basis upon which to reject the vocational expert's determination that applicant is not feasible for vocational rehabilitation. (Ex. 1, Report of P. Steve Ramirez, dated February 1, 2022, at p. 15.)

We will affirm the December 11, 2023 F&A, accordingly.

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/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 28, 2024

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

ANDRE FLORES
WILLIAM A. HERRERAS, ESQ.
STATE COMPENSATION INSURANCE FUND

SAR/abs

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