WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SCOTT VON TUNGELN, *Applicant*

vs.

KEYES TOYOTA; SECURITY NATIONAL INSURANCE COMPANY, administered by AMTRUST IRVINE, *Defendants*

Adjudication Number: ADJ10900510
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Award of January 27, 2021, the workers' compensation administrative law judge ("WCJ") found that applicant, while employed as an auto mechanic during the period January 28, 1987 through April 26, 2017, sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, bilateral hips, bilateral hands, bilateral wrists, hypertension, upper gastrointestinal system, psyche, headaches, and hearing loss, causing permanent disability of 89%. The WCJ issued this finding of 89% permanent disability after accounting for apportionment to non-industrial factors, based on the WCJ's accompanying finding that there is "legal and valid apportionment of the impairments to applicant's lumbar spine, cervical spine, hypertension, upper gastrointestinal system, and headaches."

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the WCJ's finding of 89% permanent disability is not justified by the evidence. Applicant alleges the WCJ should have found that the industrial injury resulted in permanent and total disability because applicant's vocational expert, Mr. Enrique N. Vega, explained why all of applicant's vocational disability is caused by the industrial injury. Applicant further alleges that a

[1] Commissioner Marguerite Sweeney signed the Opinion and Order Granting Petition for Reconsideration dated April 6, 2021. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

finding of permanent and total disability is justified because his work injury prevents him from returning to any work, that "slight medical orthopedic apportionment" does not preclude such a finding, and that Mr. Vega found no evidence that pre-injury medical impairment caused any work-disablement. Finally, applicant contends that defendant did not meet its burden of proving apportionment because there is no vocational expert opinion establishing that applicant's inability to work is due to non-industrial factors.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of applicant's petition for reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate to the extent set forth in the attachment to this opinion, we will affirm the Findings and Award of January 27, 2021.

We further note that the WCJ's decision is consistent with *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 2023 Cal. Wrk. Comp. LEXIS 30 (88 Cal.Comp.Cases 741) [en banc] ("*Nunes* I"). Therein the Appeals Board held that vocational evidence must address apportionment, but such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. The Board explained that an analysis of whether there are valid sources of apportionment is still required, even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury. The Board subsequently affirmed these principles in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 23 Cal. Wrk. Comp. LEXIS 46 (88 Cal.Comp.Cases 894) [en banc] ("*Nunes* II").

In this case, applicant argues that his vocational expert, Mr. Vega, "acknowledged that there [is] evidence of medical apportionment [but] he reasoned that there was no evidence that suggested that any pre-existing medical impairment resulted in a work disabling condition and therefore applicant's vocational disability was apportioned 100% to industrial causes." (Petition for Reconsideration at 5:12-16, citing Exhibit 1, 7/17/19 report of Mr. Vega, p. 19.)

However, Mr. Vega's opinion is not substantial evidence under *Nunes* I and II. As specifically discussed in *Nunes* I, a vocational report is not substantial evidence if it relies upon facts that are not germane, marshalled in the service of an incorrect legal theory. Such insubstantial evidence falls under the rubric "vocational apportionment," and it is illustrated here by Mr. Vega, who relied upon facts that are not germane in opining that applicant's disability is solely attributable to his industrial injury because he had no prior work restrictions or he was able to adequately perform his job or he suffered no wage loss prior to the current industrial injury. (See *Nunes* I, 88 Cal.Comp.Cases at 754, citations omitted.)

In his petition for reconsideration, applicant also relies upon *Giroux Glass, Inc. v. Workers' Comp. Appeals Bd.* (*Hatley*) (2012) 77 Cal.Comp.Cases 730 (writ den.) to support his contention that he is entitled to an award of permanent and total disability. Applicant's reliance upon *Hatley* is misplaced. Unlike this case, in *Hatley* the Board panel apparently found no substantial evidence of medical apportionment and in that circumstance followed the vocational expert's opinion that the injured employee's infeasibility for vocational rehabilitation was entirely industrial in nature. In any event, to the extent *Hatley* is inconsistent with *Nunes* I and II, we decline to follow it because unlike *Nunes* I and II, *Hatley* is not binding authority.

In closing, we also observe it appears there is nothing in the record to support a showing of good cause to disregard the medical apportionment stipulated by applicant in this case. (See *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 (52 Cal.Comp.Cases 419); *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377 (61 Cal.Comp.Cases 554) [party not permitted to withdraw from stipulation absent showing of good cause].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of January 27, 2021 is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 29, 2024

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

SCOTT VON TUNGELN
LAW OFFICES OF KROPACH & KROPACH
ALTMAN & BLITSTEIN

JTL/*ara*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

A Findings and Award issued on January 27, 2021 in which it was found that Scott Von Tungeln, age 57 on the Date of Injury, while employed during the period January 28, 1987, through April 26, 2017, as an Auto Mechanic, Occupational Group No. 370, at Van Nuys, California, by Keyes Toyota, insured by Security National Insurance Company, sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, bilateral hips, bilateral hands, bilateral wrists, hypertension, upper gastrointestinal system, psyche, headaches, and hearing loss, causing 89% permanent disability and a need for further medical treatment.

Applicant ["petitioner"] filed a timely, verified petition for reconsideration of the January 27, 2021 Findings and Award. Petitioner contends the WCJ erred by: a) not finding applicant to be permanently totally disabled "based on applicant's vocational expert; b) by finding medical apportionment of applicant's permanent disability when applicant's vocational expert found no vocational apportionment; and c) by finding legal and valid apportionment of permanent disability to applicant's lumbar spine, cervical spine, hypertension, upper gastrointestinal system, and headaches when [petitioner] contends that defendants failed to meet their burden of proof.

II FACTS

Applicant was employed as an auto mechanic from January 28, 1987 through April 26, 2017. Around 2010 he was in a nonindustrial motor vehicle accident that resulted in him requiring an L5/S1 lumbar fusion. After that he had complications from surgery including a hardware issue and possible infection that required a second surgery. He had chronic low back pain with left radicular symptoms thereafter. (See Joint Exhibit Y1, PQME report by Ezekiel Fink, M.D. dated February 14, 2018, page 2.) In the course of the litigation of this case the parties agreed to utilize David Heskiaoff, M.D. as an Orthopedic Agreed Medical Evaluator, and Jeffrey A. Hirsch, M.D. as an Internal Medicine Agreed Medical Evaluator. Applicant was also evaluated by Panel Qualified Medical Evaluators, Ezekiel Fink M.D. in Pain Management, and David E. Sones, M.D. in Psychiatry. Applicant also obtained a Vocational Rehabilitation Evaluation Report by Enrique N. Vega. At the time of trial the parties stipulated that the apportionment of applicant's cervical spine and lumbar spine disability as outlined by Agreed Medical Evaluator David Heskiaoff, M.D., the apportionment of applicant's blood pressure and upper gastrointestinal disability as outlined by Agreed Medical Evaluator, Jeffrey A. Hirsch, M.D., and the apportionment of applicant's headaches as outlined by Panel Qualified Medical Evaluator Ezekiel Fink, M.D., was legal and valid apportionment. (See MOH/SOE dated 8/26/2020, page 3, line 1 through page 4, line 5.) A Findings and Award issued on January 27, 2021 finding, *inter alia,* that applicant's injury caused permanent disability of 89% after legal and valid apportionment of applicant's lumbar spine, cervical spine, hypertension, upper gastrointestinal system, and headache disabilities. Applicant's timely verified petition for reconsideration followed.

III
DISCUSSION

A
No Finding of Permanent Total Disability

Petitioner contends that this judge erred in failing to find the applicant permanently [and] totally disabled based on the vocational reporting by Enrique Vega. Citing *Franklin v. Workers' Comp. Appeals Bd.*, 18 Cal. App. 3d 682, petitioner argues:

> "A workers compensation judge who relies on the report of a doctor must give full weight to the findings of that Doctor and may not omit a factor of disability described by the doctor. The same standard should apply to vocational expert reports." (Petition for reconsideration dated February 4, 2021, page 3, lines 15 through 18.) (Citation omitted.)

This argument presupposes that this WCJ found the vocational opinion of Enrique Vega more persuasive than the opinions of the Agreed Medical Evaluators. This WCJ did not.

This WCJ relied upon the opinions of the Agreed Medical Evaluators (AMEs), whom the parties presumably chose because of the AME's expertise and neutrality. This WCJ did not rely upon the opinion of applicant's vocational expert. The requirements for vocational expert reports are outlined in 8 CCR 10685 (formerly 8 CCR 10606.5). Subsection 8 CCR 10685 (c) (6) provides that the report should include, where applicable: "[t]he injured employee's medical history, including injuries and conditions, and residuals thereof, if any." On page 2 of his report Mr. Vega describes the claimed mechanism of applicant's cumulative trauma claim but the report includes no history of applicant's 2010 nonindustrial motor vehicle accident that resulted in an L5/S1 lumbar fusion, followed by complications from surgery including a hardware issue and possible infection that required a second surgery, and chronic low back pain with left radicular symptoms thereafter. (See Joint Exhibit Y1, PQME report by Ezekiel Fink, M.D. dated February 14, 2018, page 2.) This WCJ found this omission to be a significant inadequacy in the required history in Mr. Vega's report. Upon this basis this WCJ did not find the report to be a good reason to find the AME's opinions unpersuasive (see *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal. App. 3d 775, 782 [51 Cal. Comp. Cases 114].)

For the reasons set forth below, even if this WCJ had found the reporting of Enrique Vega to be persuasive, this WCJ does not believe he can ignore substantial medical evidence on the issue of apportionment.

B
Medical versus Vocational Apportionment

Petitioner contends that the vocational reporting by Enrique Vega adequately rebutted the scheduled rating. Further, petitioner contends that since applicant should be found permanently totally disabled based on vocational evidence, the medical evidence of apportionment should be not apply. In support of this contention petitioner cites *Bagobri v. AC Transit, PSI*, 2019

Cal.Wrk.Comp. P.D. LEXIS 384. Petitioner indicates that like the applicant in *Bagobri*, Mr. Von Tungeln's "pre-existing medical impairment did not impact applicant's ability to work and should not be used to apportion applicant's vocational disability." (Petition for reconsideration dated February 4, 2021, page 12, lines 17 through 19.)

Assuming, *arguendo*, that applicant's vocational reporting had successfully rebutted the scheduled rating, medical apportionment would still apply. In *Bagobri v. AC Transit, PSI*, 2019 Cal.Wrk.Comp. P.D. LEXIS 384, the WCAB upheld the decision of a WCJ who relied on a vocational expert's opinion based on "vocational apportionment". However, the WCJ had specifically found that the medical apportionment was "legally impermissible." In the present case the parties stipulated that the medical apportionment outlined by Drs. Heskiaoff, Hirsch, and Fink was legal and valid apportionment.

In *Acme Steel v. Workers' Comp. Appeals Bd., (Borman)* (2013) 218 Cal.App.4th 1137, 78 Cal.Comp.Cases 751, the Court of Appeal held that even if the rating schedule was rebutted by expert vocational evidence, when faced with unrebutted substantial medical evidence of apportionment the WCAB should parcel out causative sources - nonindustrial, prior industrial, current industrial - and decide the amount directly caused by the current industrial source. That is what this WCJ did.

Petitioner argues that the vocational evaluator's finding of permanent total disability should not be apportioned because "it is [Mr. Von Tungeln's] multiple industrial orthopedic impairments and problems with pain that prevent him from benefiting from vocational rehabilitation services." (Petition for Reconsideration dated February 4, 2021, page 13, lines 2 through 4.) This WCJ noted that the vocational evaluator Vega opined that:

> "Mr. Von Tungeln has significant orthopedic impairments related to his cervical spine, lumbar spine, bilateral hips, right shoulder and both hands. There are multiple surgeries noted including lumbar spine fusion, right hand carpal tunnel release and bilateral hip replacements. His residual functional capacity is in a restricted range of sedentary work, but he has poor handling and fingering ability. There are no skills that would transfer to sedentary occupations and his access to occupations is practically zero. A combination of an inability to sit, stand or walk for long and having poor handling and fingering aptitudes make this man non-feasible for vocational rehabilitation services."
>
> (Exhibit 1, Vocational Rehabilitation Evaluation Report by Enrique N. Vega dated July 17, 2019, page 2.)

In essence, Mr. Vega's finding of permanent total disability is based on applicant's orthopedic permanent disability. […] However, this WCJ did not find that the schedule had been rebutted [by Mr. Vega's vocational opinion]. This WCJ found 89% permanent disability after application of the combined values chart based upon the medical reporting and based upon legal and valid medical apportionment to which the parties stipulated.

C
Burden of Proof on Issue of Apportionment

Petitioner correctly points out that the defendant has the burden of proof on the issue of apportionment. However, in this case the parties stipulated that the apportionment of applicant's cervical spine and lumbar spine disability as outlined by Agreed Medical Evaluator David Heskiaoff, M.D., the apportionment of applicant's blood pressure and upper gastrointestinal disability as outlined by Agreed Medical Evaluator, Jeffrey A. Hirsch, M.D., and the apportionment of applicant's headaches as outlined by Panel Qualified Medical Evaluator Ezekiel Fink, M.D., was legal and valid apportionment. Upon this basis it was found that defendant met its burden of proof on the issue of apportionment.

IV
RECOMMENDATION

It is respectfully recommended that applicant's petition for reconsideration be denied.

DATE: March 3, 2021

Randal Hursh
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE