WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RONALD NELSON, ***Applicant***

vs.

MASTEC, INC.; ACE AMERICAN INSURANCE, administered by ESIS, ***Defendants***

Adjudication Number: ADJ9996033;
Anaheim 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/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 27, 2021

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

RONALD NELSON
LAW OFFICE OF STEVEN MELINE
RENZI LAW
EMPLOYMENY DEVELOPMENT DEPARTMENT

PAG/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Date of Injury:	June 2, 2014 through March 20, 2015
Occupation:	Alarm Technician
Parts of Body Injured:	Pulmonary system (invasive aspergillis) and adrenal gland
Identity of Petitioner:	Defendant
Timeliness:	The petition was timely filed on October 29, 2021
Verification:	The petition was verified
Date of Findings & Award:	October 7, 2021
Petitioner's Contentions:	Petitioner contends the WCJ erred by: 1) finding applicant to be 100% permanently totally disabled and 2) finding the reports and opinions of PQME Dr. Levi Hendel constituted substantial medical evidence on the issue of apportionment resulting in the 100% non-apportioned award.

II
FACTS

The matter was submitted on the documentary record on July 27, 2021. On October 7, 2021, this trier of fact issued her Opinion on Decision and Findings and Award finding among other things that Dr. Hendel's opinions constituted substantial medical evidence and as a result, applicant is 100% permanently and totally disabled solely as the result of his industrial injuries. (EAMS Doc ID's 74737198 and 74737192.) It is from these findings that the Petition for Reconsideration was filed contending that the record did not support a finding that applicant was 100% permanently and totally disabled and that the reports of Dr. Hendel do not constitute substantial medical evidence on the issue of apportionment. Applicant filed a timely Answer. (EAMS Doc ID 38901693.)

Inexplicably, both defendant's Trial Brief and Petition for Reconsideration discuss at length injury AOE/COE and seem to imply that applicant's development of aspergillis on an industrial basis is suspect. Defendant admitted industrial injury to applicant's pulmonary system (invasive aspergillis), and adrenal gland. (MOH 2:1:13-16 (EAMS Doc ID 74350630).) Injury AOE/COE was not at issue. In fact, the only issues presented for trial were permanent and stationary date, permanent disability and apportionment, the need for further medical treatment and attorney's fees. (MOH 3:20-25 (EAMS Doc ID 74350630).)

III.
DISCUSSION

Applicant was evaluated by Internal Medicine PQME Dr. Eli Hendel in connection with his admitted industrial injuries. Dr. Hendel authored seven reports in total and submitted to two depositions the last of which occurred on June 3, 2020.

A. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDING OF 100% PERMANENT TOTAL DISABILITY.

Petitioner's argument is that Dr. Hendel's medical reporting and opinions do not constitute substantial medical evidence and it was error to rely on them in part because "the reports upon which the judge relies are reports where the applicant was not evaluated and was not evaluated in this matter since 2017" and based on the premise that applicant was only evaluated by Dr. Hendel on one occasion. (Petition for Reconsideration at 6:23-25, 7:4-5; 7:8-10 (EAMS Doc ID 38840143).) Those statements however, completely misrepresent the facts and evidence. Dr. Hendel evaluated the applicant on four occasions, the most recent examination having taken place on September 13, 2019. (Applicant's Exhibits 2 (EAMS Doc ID 36217847), 3 (EAMS Doc ID 36217848), 4 (EAMS Doc ID 36217849), and 8 (EAMS Doc ID 36217853).)

Following the most recent examination of the applicant, in his report of September 13, 2019, Dr. Hendel noted applicant's present complaints as follows:

1. He has shortness of breath during activities of daily living and sometimes when talking. He has a chronic cough productive of sputum. He has not had hemoptysis. The cough wakes him up in the middle of the night.
2. He has extreme fatigue and tiredness. He does not have the strength to take bath on his own, he needs help.
3. He has poor memory. (Applicant's Exhibit 8 at page 7 (EAMS Doc ID 36217853).)

Under "REVIEW OF SYMPTOMS" Dr. Hendel noted,

> "HEENT: He has poor hearing. He has very poor appetite and he describes having very little taste. His vision is blurry.
>
> Respiratory: He has extensive respiratory symptoms as described earlier. Shortness of breath on activities of daily living and chronic productive cough.
>
> Cardiac: No chest pain. He does have paroxysmal nocturnal dyspnea.

> Gastrointestinal: He has poor appetite. He has nausea. No GI bleed. No melanotic stools. Genitourinary: No dysuria, no hematuria, no hesitancy, no frequency." (*Id.*)

The physical examination revealed that applicant "appear[ed] to be congested, frequently coughing throughout this interview and interruption of history taken." It was further noted that applicant had "ronchi and wheezing bilaterally." (*Id.*) Diagnosing applicant with Aspergillosis and adrenal insufficiency, Dr. Hendel opined:

> "Mr. Nelson has fungal disease that is now being classified as invasive
>
> Invasive aspergillosis is the most serious form of infection with this fungal agent. It usually occurs in immunocompromised patients and it has high mortality. What it means is that the Aspergillus is not just present in culture but it is seen as penetrating tissue and has the potential to propagate. . . .
>
> He has now developed adrenal insufficiency
>
> Adrenal insufficiency occurs when the adrenal glands don't make enough of certain hormones including cortisol. Cortisol is a steroid which is called the "stress hormone" therefore having adrenal insufficiency may make the individual less prone to handle stress. The most common symptoms are fatigue, muscle weakness, loss of appetite and weight loss." (*Id*. at page 5.)

Based thereon, Dr. Hendel opined as follows:

> "It is evident based on the history and the examination that his state at this time with the combination of all the systemic effects of the medications and the infection that he is at a state that he cannot reasonably compete in the open labor market. It is unlikely that he can go on an interview in the state that he is at at this time and able to procure a job. In the event(sic) that he gets the job, according to the symptoms that he has described with poor memory and exhaustion, it is not likely that he can have a job that is expected to fulfill 8 hour shift." (*Id*. at pg. 6.)

Dr. Hendel reiterated this opinion in his report dated October 4, 2019, as follows:

> "It is evident from my interaction with Mr. Nelson and after learning about his symptoms and the medical problems as evaluated and diagnosed by the Doctors at UCLA, that Mr. Nelson is unable to seek or(sic) compete for employment in the open labor market.

> Based on his symptoms of cough, congestion, fatigue he cannot be expected to complete a full shift of work or present himself in an interview to get a job." (Applicant's Exhibit 9 at pg. 31 (EAMS Doc ID 36217854).)

In his deposition of June 3, 2020, Dr. Hendel again confirmed his opinion as follows:

> "Q: But based on the tables in the AMA Guides, is there any table which you utilized which would render the impairment rating to be one of 100 percent permanent and total disability?
>
> A: No there isn't a table. It's based on the clinical picture of Mr. Nelson, taking into account his cognitive deficit, his – the percentage of the adrenal, the percentage of the respiratory and the – and his clinical description of his present abilities to conduct activities of daily living in his house, it was my feel that he cannot compete an eight-hour shift –
>
> --even if it's stationary. And even more so, for him to go to an interview and appear the way he appeared in front of me – and I saw him with his wife. It is my feeling that someone who appears that way would not reasonably be able to obtain a job – a full-time job." (Applicant's Exhibit 10 at 21:18-22:14 (EAMS Doc ID 36274875).)

After a thorough review of all of the documentary evidence, it was found that the medical reporting of PQME Dr. Eli Hendel constituted substantial medical evidence on the issue of permanent disability and it was determined that Dr. Hendel's opinion that applicant was 100% permanently and totally disabled was supported by the medical evidence.

Petitioner also argues that Dr. Hendel's reporting does not constitute substantial medical evidence because he did not review any reports from applicant's treating physicians at UCLA after April 2019. (Petition for Reconsideration at 6:9-19 (EAMS Doc ID 38840143).) It should be noted, however, that no such UCLA reports were offered into evidence nor was there any indication that the defendant had made any attempts to either secure said reporting or question Dr. Hendel regarding same. As a result, it remains the opinion of this trier of fact that the opinions of Dr. Hendel as written/stated constitute substantial medical evidence that supports a finding of 100% permanent and total disability.

In addition, applicant's vocational evaluator Roderick Stoneburner issued a report dated January 31, 2020 in which he carefully and thoroughly described applicant's vocational difficulties. Mr. Stoneburner noted that "[v]ocational testing was terminated before completion as Mr. Nelson was experiencing fatigue, difficulty with breathing, and did not seem to be able to maintain

concentration on tasks presented to him." Mr. Stoneburner terminated the vocational testing after one hour during which time he "observed Mr. Nelson engaged in labored breathing. He was complaining of dizziness, and extreme fatigue. His work appeared to be somewhat erratic, in that he skipped questions for no apparent reason other than loss of concentration due to fatigue and dizziness." (Applicant's Exhibit 1 at pgs. 14-15 (EAMS Doc ID 36217846).)

Mr. Stoneburner found the following: 1) "The cumulative effects of his industrial injuries and the consequences of medical treatment are sufficient to prevent Mr. Nelson from engaging in any employment on the open labor market."; 2) "Mr. Nelson has no access to employment, and therefore has no residual earning capacity."; and 3) "Mr. Nelson is incapable of engaging in full time competitive employment. His physical impairments significantly prevent adequate performance, production and attendance." As a result, Mr. Stoneburner concluded that applicant is not amenable to vocational rehabilitation, is unemployable and has no earning capacity. (*Id.* at pgs. 16-17.)

Petitioner implies that the reporting of its vocational evaluator Keith Wilkinson is more persuasive as Mr. Wilksinson "noted that based on the limitations provided by the doctors, he [applicant] retains the capacity to work from home." (Petition for Reconsideration 7:26-28 (EAMS Doc ID 38840143).) Mr. Wilkinson, who conducted no vocational testing and noted that applicant cannot keyboard and does not own a computer, opined that "[b]ecause of his breathing difficulties, Mr. Nelson would be unable to compete for jobs at an employer's location. However, based on my observations of Mr. Nelson during my appointment with him, he could probably work from home." (Defendant's Exhibit C at 31 EAMS Doc ID 36694683).)

As evidence thereof, Mr. Wilkinson highlighted some part-time home-based jobs he believed applicant could perform including "Data Manager for Clinical Trials" for an "Unnamed Private Biotec Company" that requires 3-5 years of data management experience and a Bachelor's degree (none of which the applicant possesses), "Insurance Agent" for "Colonial Life" that prefers the candidate to have sales experience and be bilingual in Spanish and English (none of which the applicant possesses), and "Commission Sales Representative" for "KB Medical Group" which requires a Bachelor's degree and/or minimum 3-5 years sales experience in medical devices and disposable (again none of which applicant possesses). (*Id* at pgs. 18 and 27-30.) In fact, Mr. Wilkinson was unable to identify any jobs that applicant was qualified to perform in light of Dr. Hendel's unrebutted opinion that applicant "cannot be expected to complete a full shift of work or present himself in an interview to get a job." (Applicant's Exhibit 9 at pg. 31 (EAMS Doc ID 36217854).) As a result, it was found that Mr. Wilkinson's report is not persuasive and does not constitute substantial evidence upon which this Court could rely.

As an aside, petitioner now implies that applicant was not truthful in his report of not owning a computer and being unable to keyboard as relayed to their vocational expert Mr. Wilkinson. As evidence thereof, petitioner references the purported testimony of the applicant at deposition that he apparently has "an iPad and was able to look things up." (Petition for Reconsideration 8:2-4 (EAMS Doc ID 38840143).) Applicant's deposition was not offered into evidence nor was the applicant called to testify. In violation of 8 CCR 10945(b), petitioner is referencing purported testimony that is not in the evidentiary record to support its position that applicant is somehow employable.

Nevertheless, it was based on the unrebutted medical opinion of Internal PQME Dr. Hendel coupled with the opinion of vocational evaluator Roderick Stoneburner, both of which were found to be persuasive and substantial evidence, that it was found that applicant is 100% permanently totally disabled as a result of his industrial injuries.

B. APPLICANT IS ENTITLED TO AN UNAPPORTIONED AWARD

Petitioner contends that the record needs to be developed with respect to apportionment as Dr. Hendel's reports do not comply with the law. (Petition for Reconsideration 14:2-7 (EAMS Doc ID 38840143).) As evidence thereof, Petitioner points to a discussion in an early report wherein Dr. Hendel stated,

> "When he reaches the status of whole-person impairment, we would have to differentiate how much of his pulmonary impairment is a result of scarring resulting from this infection of aspergillus, which should be considered industrial, and how much of the impairment is as a result from the asthma, which is not industrial since he had it prior." (Applicant's Exhibit 3 at pg. 19 (EAMS Doc ID 36217848).)

It is for this reason that Petitioner claims there "should be apportionment to the Applicant's non-industrial asthma" and the failure of Dr. Hendel to provide same in his subsequent reporting renders said reporting insubstantial. (Petition for Reconsideration 11:14-16 (EAMS Doc ID 38840143).) What this argument fails to recognize, however, is that Dr. Hendel extensively opined on the issue of apportionment and he fully and exhaustively explained his opinions thereon.

In his report of September 30, 2018, Dr. Hendel reviewed applicant's pulmonary function tests and outlined the results as follows:

> "A Pulmonary Function Test was done in my office my interpretation is as follows:
>
> The Forced Vital Capacity was within normal limits measuring 3.78 lts and its 87% of predicted. The pulmonary airflows are severely

reduced in the medium to large airways and the FEV1 is 1.76 lts and it is 52% of predicted and it is 47% of the vital capacity.

There was no significant improvement after bronchodilators.

The Lung Volumes showed that the Total Lung Capacity being 7.97 lts and it is 117% of predicted. The residual volume was 3.36 lts and it is 148% of predicted lts and it is 42% of the total lung capacity.

The diffusion capacity of carbon monoxide was normal and it was 78% of predicted indicating no difficulty with gas exchange.

The Maximal Voluntary Ventilation was reduced measuring 64 lts per minute and it is 48% of predicted indicating a poor respiratory reserve." (Applicant's Exhibit 7 at pg. 3 (EAMS Doc ID 36217852).)

Based on the above test results, Dr. Hendel concluded that applicant,

"Shows evidence of obstructive lung disease by means of a reduction in the airflows with poor reversible component and shows evidence if(sic) emphysema by means of alteration of the lung volumes with increased residual volume at the expense of the vital capacity. This is consistent with hyperinflation seen in COPD." (*Id.*)

Dr. Hendel also concluded that the pulmonary functions tests clearly showed that the entirety of the respiratory impairment sustained by the applicant was a direct result of his industrial aspergillis, and not his pre-existing asthma.

"He has FEV1 that has deteriorated from 2015 when it was 2.40 lts

He was hospitalized for asthma as a child, a history of asthma that would require hospitalization would make him vulnerable to the effects of aspergillus

If there would be a component of asthma to indicate the abnormality of the pulmonary function test this would be reflected by improvement after bronchodilators and this is not present

Has documented presence of aspergillus on the bronchoscopy washings

The fact that he has high lgE indicates that he had an allergic reaction to the fungus that resulted in prolonged period of inflammation and that propagated the damage to the lungs

> The bronchoscopy that he had in October 2014 showed that the left upper lobe was narrowed at least 50%. This is not the result of asthma but the result of the infection
>
> Quantiferon Gold test was negative so there is no component of possible Tuberculosis
>
> CT scan of the sinus done in 2016 showed complete opacification of the left maxillary sinus which is also seen with allergic bronchopulmonary aspergillosis
>
> Given that we are giving the impairment to the end results of the infection, not the pre existing asthma the present whole person impairment is 100% to industrial causes and 0% impairment to his pre existing history of asthma.
>
> There are no other non industrial factors to apportion" (*Id.* at pgs. 5-6.)

In his report of September 13, 2019, Dr. Hendel also confirmed that applicant's impairment from his adrenal insufficiency is likewise solely and directly apportionable to industrial causes.

> "Regarding to apportionment, he does not have other factors than the fungal illness and the treatment with antifungal medications all deemed to be industrial therefore the impairment is 100% apportioned to industrial causes and 0% to other factors" (Applicant's Exhibit 8 at pg. 6 (EAMS Doc ID 36217853).)

This opinion was confirmed in Dr. Hendel's report of October 4, 2019,

> "It is evident that he has adrenal insufficiency resulting from the complications of the treatment of the fungal infection of Aspergillus which is deemed to be industrial.
>
> Therefore the impairment resulting from the adrenal insufficiency should be deemed to be industrial.
>
> . . .
>
> Apportion is 100% to industrial causes due to the reasons explained above." (Applicant's Exhibit 9 at pg. 31 (EAMS Doc ID 36217854).)

Even the vocational experts concluded that applicant's vocational disability is apportioned solely to his industrial injuries. Mr. Stoneburner concluded that

applicant's respiratory condition is vocationally disabling applicant from any competitive employment and that applicant's vocational disability is apportioned solely to said respiratory condition.

> "In my opinion, within reasonable vocational certainty, the cause of Mr. Nelson's vocational disability (inability to engage in any employment), the medical impairments from Mr. Nelson's respiratory condition is profound and vocationally disabling from any competitive employment. Thus, I have identified vocational apportionment to be the primary disabling injury that precluded Mr. Nelson from engaging in competitive employment. He no longer employable and has no earning capacity. I have apportioned vocational disability solely to the respiratory condition." (Applicant's Exhibit 1 at pg. 18 (EAMS Doc ID 36217846).)

Defendant's vocational expert also opined, "Since Dr. Hendel has apportioned Mr. Nelson's internal medicine condition to the CT, it is my opinion that 100% of his loss of earning capacity is industrial in nature." (Defendant's Exhibit C at pg. 15 (EAMS Doc ID 36694683).)

Because it was defendant's burden to prove the existence of non-industrial apportionment (pursuant to *Escobedo*), and no opinion was offered that would support non-industrial apportionment, no apportionment was found.

IV
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied in its entirety.

DATE: November 10, 2021
Stefanie Ashton
WORKERS' COMPENSATION JUDGE