WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WILLIAM GARRISON, *Applicant*

vs.

COUNTY OF LOS ANGELES, PERMISSIBLY SELF-INSURED; ADMINISTERED BY SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ11220615; ADJ11220621
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the December 27, 2022 Joint Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) determined applicant had sustained permanent and total disability, without apportionment.

Defendant's Petition for Reconsideration (Petition) contends the reporting of applicant's vocational expert is not substantial evidence, and that the WCJ failed to consider evidence of nonindustrial apportionment.

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 Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A, except that we will grant reconsideration solely to amend the Award to defer the issue of the permanent disability start date and associated benefits.

FACTS

In ADJ11220615, applicant claimed injury to the skin, psyche, knees, low back, colon and hernia, and in the form of hearing loss, anal leakage, and anemia, while employed as a firefighters by defendant County of Los Angeles from September 20, 1999 through October 18, 2017.

In ADJ11220611, applicant claimed injury to the right knee and low back while employed as a firefighters by defendant County of Los Angeles on October 17, 2017.

Pursuant to a Dispute Resolution Agreement reached between defendant and applicant's union Local 1014, applicant's claims of workplace injury were evaluated by Independent Medical Evaluators (IMEs). (See Petition, p. 3, fn. 1; Answer, at 2:3.)

Edwin Haronian, M.D. served as the IME in orthopedics. Dr. Haronian's report of April 25, 2018 assessed 22% whole person impairment to the lumbar spine, and 3% whole person impairment to the right knee, without apportionment. (Ex. E, report of Edwin Haronian, M.D., dated April 25, 2018, p. 4.) In a report of November 17, 2019, Dr. Haronian also noted an additional 4% to the right knee impairment as a result of a prior partial meniscectomy, resulting in 7% total impairment. (Ex. B, report of Edwin Haronian, M.D., dated November 17, 2019, at pp. 1-2.)

John Green, M.D. served as the IME in internal medicine. Dr. Green's initial report of April 17, 2018 noted applicant's history of ulcerative colitis, beginning in approximately 2015. (Ex. N, report of Jonathan Green, M.D., dated April 17, 2018, p. 6.) Dr. Green opined that the ulcerative colitis was likely industrially aggravated, but requested additional medical records. (*Id*. at p. 7.) Following receipt of additional records, Dr. Green confirmed the diagnosis of ulcerative colitis that "required major surgery to remove the colon with the patient then having…multiple complications, surgeries, and dilations." (Ex. M, report of Jonathan Green, M.D., dated December 2, 2018, at pp. 4-5.) Noting that the surgical removal of the colon had resulted in "moderate to severe exacerbations with medications and special dieting as well as constitutional manifestations," Dr. Green assessed 45% impairment as a result of applicant's colonic disease, and 10% impairment as a result of partial fecal incontinence. (*Ibid.*) Dr. Green's described apportionment as follows:

> With regard to apportionment, the majority, or 80%, of the Impairment is related to job stressors which, in my opinion, have triggered the disease. Stress, however, does not cause colitis de novo but is a known and, indeed, well-known aggravating factor. The patient has 20% nonindustrial apportionment as he has underlying immunologic abnormalities in the form of rheumatoid arthritis. The immunologic abnormality, thus, is the reason the patient is more sensitive to the stress which I believe has led to the Impairment. (*Id*. at p. 6.)

Following the receipt of additional record, Dr. Green issued a supplemental report of December 28, 2018, noting the records confirmed a prior history of rheumatoid arthritis documented in 2015. (Ex. L, report of Jonathan Green, M.D. dated December 28, 2018, p. 6.)

On June 4, 2020, Dr. Green reevaluated applicant, reiterating applicant's ongoing symptoms, including four documented episodes in which applicant's bowel closed down, resulting in the need for dilation procedures. (Ex. J, report of Jonathan Green, M.D. dated June 4, 2020, p. 3.) Applicant further reported the need to use the bathroom 12 to 16 times daily, as well as the need to extraordinary dietary measures taken to prevent incontinence. (*Ibid.*) Dr. Green further noted that applicant had developed anemia, but did not describe changes to applicant's impairment levels. Dr. Green's supplemental reporting of September 25, 2020 rated the anemia by analogy as a condition requiring regular transfusions, and assigned an additional 11% impairment. (Ex. I, report of Jonathan Green, M.D., dated September 25, 2020, p. 5.)

On April 1, 2021, the parties deposed Dr. Green. When asked about his assessment of applicant's impairment, Dr. Green testified:

> Q. And, as we have also discussed, even through the years you have seen him -- and you haven't seen him for at least 18 months -- he has improved at times; correct?
>
> A. He has improved as far as the colitis in the sense that he is not losing weight, but he has these other complications from the surgery. He has had recurrent intestinal obstructions. In one way he is better, but the other way he is still battling the side effects of the disease which led to the surgery and then the complications. He has to go in frequently for these dilations because of the -- not so much from the inflammation but from the surgery. (Ex. H, transcript of the deposition of Jonathan Green, M.D. dated April 1, 2021, at 21:7.)

Dr. Green further testified with respect to the causes of applicant's present disability:

> Q. All right. Given the fact that he is no longer under that daily stress and he has -- as you have testified, from time to time he shows improvement, would you find it prudent to reevaluate him at this point to see how he is doing, his situation today?
>
> A. The impairment level would be the same because he had the colitis; he had his colon removed, but now he has all the complications from the surgery. His nutrition stabilized. So the rating for the colitis would be the same. The rating for the anemia would be the same. I don't think a reevaluation would be helpful.
>
> …

> Q. Well, Dr. Green, I think you have stated pretty clearly about the nature of colitis. It certainly happens to patients with colitis that they go into remission. They get better. They get worse. It's something that can change.
>
> A. That's true. The difference in this case is that most of the cases where we see the remission, where they do so much better, they still have their colon, and they are given various medications and it causes a prolonged remission. That was the basis of your very first question, if I remember right. What has happened in this case is that he is having complications from his surgery that's causing all sorts of problems with him with the need for dilations and things that are from the surgery rather than actually prolonged remission from the colitis. So he is having complications from the treatment, and I think that's probably never going to go away. (*Id.* at 29:18.)

Howard Sofen, M.D., evaluated applicant as the IME in dermatology, and diagnosed actinic keratosis, with 5% impairment, apportioned 85% to industrial sun exposure. (Ex. O, report of Howard Sofen, M.D. dated May 22, 2018, at p. 3.)

Bruce Leckhart, Ph.D., acted as the IME in psychology, and identified a depressive disorder not otherwise specified and clinical primary insomnia. (Ex. Q, report of Bruce Leckhart, M.D., dated May 14, 2018, at p. 25.) Dr. Leckhart assigned a GAF score at 62, with apportionment to industrial and nonindustrial factors. (Ex. P, report of Bruce Leckhart, M.D., dated February 8, 2019, at pp. 4-5.)

Raffi Mesrobian, M.D., evaluated applicant as the IME in otorhinolaryngology, and diagnosed a history of hearing loss and tinnitus, with 8% and 10% impairment, respectively. Dr. Mesrobian did not identify any nonindustrial factors of apportionment.

On September 15, 2022, the parties proceeded to trial, framing issues of permanent disability and apportionment, along with attorney fees and the issue of whether there was need for future medical care. Applicant testified over two days of trial.

On December 27, 2022, the WCJ issued the F&A, determining in relevant part that applicant was permanently and totally disabled, without apportionment. (F&A, Findings of Fact No. 5, 6 and 7.)

Defendant's Petition contends the WCJ failed to account for the nonindustrial apportionment identified by Dr. Green. (Petition, at 2:7.) Defendant further contends applicant's vocational expert reporting is not substantial evidence as it is contrary to the medical-legal evidence, fails to "adhere to reliable principles and methods required in the field of Vocational Rehabilitation," and discounted Dr. Green's apportionment to nonindustrial causes. (*Id*. at 10:8.)

Applicant's Answer contends defendant's vocational expert failed to consider applicant's non-orthopedic work restrictions, and that the WCJ properly held there was no legal basis for apportionment. (Answer, at 8:3.) Applicant contends the apportionment analyses of the IMEs are conclusory, and fail to appropriately explicate the reasoning behind the apportionment. Applicant further contends that Dr. Green apportioned to preexisting rheumatoid arthritis, a diagnosis that that Dr. Green did not make, and one that is not supported in the record. (*Id*. at 13:28.)

The WCJ's Report reiterates his determination that applicant was a credible witness, and that the vocational evidence supports a determination of permanent and total disability. (Report, at p. 7.)

DISCUSSION

Labor Code section 4660.1 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), as applied by the Permanent Disability Rating Schedule (PDRS) in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

The scheduled rating is not absolute. (*Fitzpatrick, supra,* 27 Cal.App.5th 607, 619-620.) A rating obtained pursuant to the PDRS may be rebutted by showing applicant's diminished future earning capacity is greater than the factor supplied by the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] *(Ogilvie)*; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119].)

In analyzing the issue of whether and how the PDRS could be rebutted, the Court of Appeal has also observed:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id.* at pp. 237–238.) Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating." (*Ogilvie, supra*, at 1274.)

Thus, "an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating." (*Ogilvie, supra,* at 1277.)

The issue presented herein is whether the medical and vocational evidence constitutes substantial evidence to support the conclusion that applicant is permanently and totally disabled due to applicant's inability to benefit from vocational rehabilitation.

"The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach…It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule." (*Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*)*, supra,* 240 Cal.App.4th 746.)

Here, applicant's vocational expert Antonio Reyes, Ph.D., evaluated applicant's feasibility for a return to the open labor market, and for vocational retraining. (Ex. C, Report of Antonio Reyes, Ph.D., dated December 21, 2020, p. 1.) Mr. Reyes reviewed applicant's relevant medical history, and administered vocational skills testing. (*Ibid.*) The report observes:

> Based on his post-injury vocational profile, a transferable skills analysis produced no reasonable occupational options for Mr. Garrison. When opening the analysis to all occupations in the labor market, skilled and unskilled, there are also no results. Mr. Garrison has substantial barriers to returning to work. He experiences constant pain in his abdomen and back. He has chronic diarrhea and rectum bleeding. Mr. Garrison reports that he passes stool 12 to 14 times on a good day. On bad days, he spends most of the day in the bathroom. Mr. Garrison has problems sleeping because he wakes up to change himself multiple times nightly after soiling himself. Mr. Garrison has ongoing problems with poor nutrition and dehydration. He receives regular infusions due to chronic anemia. He experiences fatigue daily as a result of his nutrition problems. He is limited in his ability to perform tasks around his home due to fatigue. (*Id*. at p. 2.)

Mr. Reyes further noted applicant's significant difficulties in completing the interview as well as vocational testing, given the frequency of bathroom breaks, difficulty in pace and concentration, and general fatigue. (Ex. C, Report of Antonio Reyes, Ph.D., dated December 21, 2020, pp. 2-3.) Synthesizing the documented medical conditions, applicant's transferable skills, and the results of the vocational interview and skills testing, Mr. Reyes concluded that applicant would not benefit from vocational rehabilitation services. (*Id*. at p. 3.)

In a supplemental report of May 10, 2021, Mr. Reyes reviewed the transcript of the deposition of Dr. Green, wherein Dr. Green opined that applicant could not return to work as a firefighter, but could perform a sedentary occupation with ready access to a bathroom and no excessive stress. (Ex. B, report of Antonio Reyes, Ph.D., dated May 10, 2021, at p. 3.) Mr. Reyes noted that these restrictions were more significant than previously thought. Mr. Reyes observed that applicant would often resort to not eating as a coping strategy prior to various appointments such as the vocational skills assessment. However, Mr. Reyes noted that "limiting eating would not be a viable long-term strategy for Mr. [Garrison] to use to manage his symptoms, and return to work given his problems with anemia, dehydration, and lack of nutrition. Such a strategy used on a regular basis would likely exacerbate Mr. Garrison's problems and related symptoms." (*Ibid.*) Dr. Reyes reiterated that "Mr. Garrison is not able to meet the minimum requirements of competitive employment given his ongoing problems." (*Ibid.*)

Mr. Reyes issued a supplemental report on March 2, 2022, following his review of the deposition of applicant, the deposition of orthopedic IME Dr. Haronian, and review of the reporting of defendant's vocational expert, Ms. Winn. (Ex. A, report of Antonio Reyes, Ph.D., dated March 2, 2022, at p. 1.) Mr. Reyes noted a difference of opinion with Mr. Winn primarily arising out of their respective assessments of the appropriate work restrictions. (*Id*. at p. 5.)

Following a review of the relevant work restrictions as assessed by the various IMEs, however, Mr. Reyes again observed that applicant's restrictions arising from the removal of most of his colon would materially interfere with his ability to return to the labor market. "The most important finding I cited related to vocational testing was that Mr. Garrison needed frequent trips to the restroom that were disruptive to the evaluation. He needed numerous breaks even though he fasted prior to the evaluation, something that would not be a viable long-term strategy for him if he were to try to return to work." (*Id*. at p. 7.) Mr. Reyes further opined that applicant's internal-medicine issues alone would preclude his return to the labor market, separate and apart from his orthopedic and other limitations. Mr. Reyes concluded:

> A requirement of any job in the labor market is that an employee be at their workstation reliably and perform work on time. *This is true for skilled and unskilled positions as well as in-office or work-from-home jobs.* Every job has expectations for productivity within time-constraints. Mr. Garrison would not be able to meet these minimum requirements for competitive employment due to his symptoms. No employer would be able to accommodate Mr. Garrison's problems related to ulcerative colitis. (*Id*. at p. 8, emphasis added.)

Reporting for the defendant, Kelly Winn reviewed applicant's medical records, including several of the reports of internal medicine IME Dr. Green. (Ex. BB, report of Kelly Winn, M.S., dated January 25, 2022.) Ms. Winn further reviewed applicant's vocational history, activities of daily living, and transferable skills. (*Id*. at pp. 20-23.) Ms. Winn observes:

> In regard to Mr. Garrison's formally imposed work restrictions, these are minimal in the records reviewed. For example, Dr. Green does not outline any limitations in his reporting to enable formal vocational analysis of the impact of his internal medicine conditions. (*Id*. at p. 24.)

Additionally, Ms. Winn noted that collateral work restrictions, including ear protection and reduced stress were not considered in her analysis. (*Ibid.*) Accordingly, Ms. Winn's analysis is confined to applicant's orthopedic limitations, which were identified as precluding heavy work and repetitive pivoting. (*Ibid.*) On this record, Ms. Winn determined that applicant was amenable to vocational rehabilitation, and that there are jobs available in the open labor market for which applicant could be retrained. (*Id*. at p. 28.)

We observe, however, that defendant's vocational expert Ms. Winn was not provided with the transcript of Dr. Green's April 1, 2021 deposition, wherein the IME identified work restrictions of a sedentary occupation with ready access to a bathroom and no excessive stress. (Ex. H,

transcript of the deposition of Jonathan Green, M.D. dated April 1, 2021, at 42:4.) Additionally, Ms. Winn's reporting does not account for non-orthopedic work restrictions. (Ex. BB, report of Kelly Winn, M.S., dated January 25, 2022, at p. 24.) Accordingly, the reporting of Ms. Winn is not substantial evidence because it reaches an opinion that applicant can be retrained to enter the labor market based on an incomplete review of the medical record and an incomplete understanding of applicant's work restrictions. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16].)

We agree with the WCJ's conclusion that the reporting of Mr. Reyes better reflects applicant's credible trial testimony, as well as the medical and medical-legal reporting in evidence. Applicant's vocational expert appropriately synthesizes the work restrictions reflected in the medical record, along with applicant's medical history and vocational testing, to determine that applicant is not feasible for vocational retraining. Accordingly, we concur with the WCJ's conclusion that applicant has successfully rebutted the 2005 PDRS by establishing that "due to the residual effects of his work-related injuries, [applicant] could not be retrained for suitable meaningful employment." (*Ogilvie, supra,* 197 Cal.App.4th 1262; *LeBoeuf, supra,* 34 Cal.3d 234, 237-238.)

Defendant further contends that the reporting of Mr. Reyes fails to properly account for apportionment identified by the IMEs, including Dr. Green's apportionment of 20% to preexisting conditions. (Petition, at 10:16.)

Applicant's answer challenges the underlying basis for Dr. Green's apportionment:

> IME Dr. Green did provide medical apportionment for the ulcerative colitis, attributing 20% to non-industrial immunologic abnormalities in the form of rheumatoid arthritis. However, IME Dr. Green opined that the ulcerative colitis was triggered by his workplace exposure to stress. There is no evidence that the alleged pre-existing rheumatoid arthritis resulted in a work disabling condition. The medical record does not show the applicant missing work at any point for rheumatoid arthritis. Further, there's no evidence that the pre-existing rheumatoid arthritis had any impact on the applicant's inability to participate in vocational rehabilitation. (Answer, at 9:23.)

Defendant correctly observes, however, that the pre-existing conditions need not be labor-disabling to appropriately form the basis of apportionment. (Petition, at 12:5; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals. Bd. en banc) [factors of apportionment may include pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial medical evidence establishing that these other factors have caused permanent disability].)

However, as we explained in *Escobedo, supra*, 70 Cal.Comp.Cases 604, "even where a medical report "addresses" the issue of causation of the permanent disability and makes an "apportionment determination" by finding the approximate relative percentages of industrial and non-industrial causation under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence. (*Id*. at 620, quotes original.) We explained that a physician identifying industrial causation, "must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for [the percentage] of the disability." Likewise, a physician identifying nonindustrial factors, including underlying pathology, must explain the nature of the nonindustrial condition, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for the assigned percentage of the disability.

Here, Dr. Green's apportionment analysis is premised on a nonindustrial risk factor, rheumatoid arthritis, rendering applicant more susceptible to the onset of ulcerative colitis in the presence of significant and ongoing workplace stress.[1] (Ex. M, report of Jonathan Green, M.D., dated December 2, 2018, at pp. 6.) However, in deposition testimony, Dr. Green explained that following his colectomy, it was the sequelae from applicant's surgery that caused the residual impairment:

> Q. Is it fair to say that due to the surgery itself, the removal of the colon, and the complications, is that why the applicant now has these dilatation procedures, the leakage, and also the anemia?
>
> A. Yes. The colitis is stable, but he has got surgical complications.

[1] We acknowledge applicant's dispute as to the existence and diagnosis of preexisting rheumatoid arthritis. (Answer, at 14:4.) We further acknowledge defendant's assertion that this issue was raised for the first time at trial. (Petition, at 10:22.) However, we need not reach the issue given our determination, *infra*, that Dr. Green's apportionment of 20% to rheumatoid arthritis does not constitute substantial medical evidence.

> Q. In other words, would the reason for his current impairment be due to that surgery and the complications of it?
>
> A. Yes. Also, the colitis itself doesn't allow him to absorb iron, so the anemia is from the colitis. (Ex. H, transcript of the deposition of Jonathan Green, M.D. dated April 1, 2021, at 31:13.)

The record does not disclose how applicant's rheumatoid arthritis, a cause of applicant's *injury,* caused the *disability* identified at the time of the evaluation, following the removal of applicant's colon. In the words of *Escobedo*, the apportionment analysis fails to explain "how and why" applicant's preexisting rheumatoid arthritis caused permanent disability at the time of the evaluation, and how and why it was responsible for approximately 20% of applicant's residual disability. (*Escobedo, supra*, 70 Cal.Comp.Cases 604.) We are thus persuaded that the apportionment identified by Dr. Green is not based on substantial evidence, and that applicant is entitled to an unapportioned award with respect to the disability arising out his internal medicine conditions.

Returning to the opinions of applicant's vocational expert, Mr. Reyes has opined that the sequelae from applicant's ulcerative colitis condition are, standing apart from applicant's orthopedic and other injuries, sufficient to preclude applicant from benefitting from vocational rehabilitation services. (Ex. A, report of Antonio Reyes, Ph.D., dated March 2, 2022, at p. 7.) We therefore agree with the WCJ's conclusion that applicant's disability is permanent and total disability, and is not subject to apportionment.

In summary, we agree with the WCJ that the reporting of applicant's vocational expert Mr. Reyes is the more well-reasoned and persuasive, and establishes that applicant's disability is permanent and total. We further agree that the defendant has not met its burden of establishing nonindustrial apportionment. Accordingly, we will affirm the award of permanent and total disability, without apportionment.

However, we note that the F&A does not identify a commencement date for permanent disability. (Findings of Fact, No. 6.) We recognize that the parties have not placed in issue either temporary disability/section 4850 time, or the permanent disability start date. However, we observe that the commencement date of permanent disability benefits is an integral component of an award of permanent disability. In submitting the issue of permanent disability for decision, it is best practice for the parties to either stipulate to a permanent disability commencement date, or to place it in issue. We also observe that the permanent disability commencement date is necessary

to the calculation of the COLA benefit pursuant to section 4659(c). (Lab. Code., § 46569(c); see *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal. Wrk. Comp. LEXIS 69] (Appeals Bd. en banc.); *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 438 [129 Cal. Rptr. 3d 133, 257 P.3d 738, 76 Cal.Comp.Cases 701].)

We will therefore grant reconsideration for the sole purpose of amending the F&A to defer the issue of the permanent disability commencement date in Findings of Fact No. 6, along with any associated benefits including adjustment under section 4659(c), pursuant to *Brower*, *supra,* 79 Cal.Comp.Cases 550.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Joint Findings of Fact, dated December 27, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Award, dated December 27, 2022 is **AFFIRMED**, except that it is **AMENDED** as follows:

JOINT FINDINGS OF FACT

* * *

6. Applicant is awarded 100% permanent total disability in ADJJ1220615, less attorneys' fees, less benefits paid and less time worked, if any, with jurisdiction reserved at the trial level. Applicant is entitled to a permanent disability award of 100% permanent total disability, equivalent to indemnity payable for life at the rate in effect from the average weekly wage of $2,881.84, subject to annual cost of living adjustments pursuant to Labor Code § 4659(c), less credits for sums previously paid, and less reasonable attorney fees in the amount of 15% of applicant's award, as set forth below, which are to be commuted from the side of the applicant's award. Permanent disability in the two cases is indistinguishably duplicated and/or overlapped.

a. The issues of the permanent disability commencement date and the commencement date of COLA adjustments pursuant to Labor Code section 4659 are deferred.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 20, 2023

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

WILLIAM GARRISON
STRAUSSNER SHERMAN LONNÉ TREGER HELQUIST
COUNTY COUNSEL LOS ANGELES

SAR/abs

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