

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ANGELA DOMINGUEZ, *Applicant*

vs.

**CECILIA WILKINSON; USAA;
administered by LIBERTY/HELMSMAN MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ953988 (VNO 0502745)
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant Angela Dominguez seeks reconsideration of the December 11, 2020 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a housekeeper on July 10, 2003, sustained industrial injury to her right upper extremity, cervical spine, psyche, headaches, upper GI, lower GI, and dental, including her TMJ, but not to her eyes. The WCJ found that applicant sustained 70% permanent disability as a result of her injury, and that pursuant to a May 15, 2010 Order, a third party credit of \$115,289.16 is applicable and subsumes the award of permanent disability.

Applicant contests the finding that she is 70% permanently disabled, and contends that she has rebutted the permanent disability rating derived from application of the Permanent Disability Rating Schedule, and has established that she is permanently totally disabled, based upon the vocational report of Laura Wilson, who found applicant is not amenable to vocational rehabilitation.¹

¹ Appeals Board Rule 10945 provides: "Every petition for reconsideration . . . shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. A failure to fairly state all of the material evidence may be a basis for denying the petition." (Cal. Code Regs., tit. 8, § 10945) Applicant's petition does not comply with these requirements, as it lacks a statement of facts detailing the material evidence, and does not provide specific references to the exhibits discussed in its arguments. This failure to properly summarize and cite the record unnecessarily encumbered the Appeals Board's effort to determine whether applicant's arguments fairly reflected the evidence. Counsel for applicant is admonished to abide by the requirements of Rule 10945, in any future petitions.

We have received and reviewed the Answer filed by defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, 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 Findings and Award and deny applicant's Petition for Reconsideration.

FACTS

Applicant sustained an admitted industrial injury on July 10, 2003, when she was in a car accident while employed as a housekeeper by Cecilia Wilkerson. In addition to the admitted injury to her right upper extremity, cervical spine, psyche, headaches, upper GI, lower GI, and dental, applicant also sustained injury to her temporomandibular joint (TMJ). The WCJ found applicant failed to establish an injury to her eyes.

At trial on September 9, 2020, applicant testified that her entire career has been working as a housekeeper and baby-sitter. She came to the United States from El Salvador in 1981, leaving her unfaithful husband and their three children. She did not speak English when she came, and can now understand some English, but needs an interpreter. She is able to read and write in Spanish. She agreed that her lack of fluency in English, and her one year of education, made it difficult for her to find work.

She testified that she has ongoing pain in her neck and right shoulder, and in her right wrist and hand where she had four surgeries. She testified that she is left hand dominant, uses her left hand for most tasks, and her left hand is stronger than her injured right hand. She can drive with her left hand, though she no longer owns a car.

She also complained of pain in her back on the right side from the shoulder to the low back. She has problems with gastritis, reporting pain in her stomach with swelling, and problems with constipation, headaches and her vision. She described problems with her teeth, mouth and jaw. She grinds her teeth at night and can no longer eat hard food due to pain. She has lost numerous teeth due to grinding, leaving only four teeth in the lower part of her mouth.

She takes medications for her internal issues and ibuprofen for her orthopedic complaints.

Applicant testified that she would love to go back to work. She is able to perform activities of daily living, such as dressing, cooking and cleaning, but has limitations due to pain. She cannot clean windows, or reach above her head. She testified that she can no longer jog or go the gym.

Applicant offered the June 15, 2017 report of vocational consultant Laura Wilson, who found that due to her industrial injury, applicant is not amenable to participate vocational rehabilitation and cannot return to the open labor market. (Ex. 1. 6/15/17 Wilson Report, p. 27-28.) In reaching her conclusions, Ms. Wilson reviewed the physical limitations caused by applicant's industrial injury identified in the medical reports of Dr. Berman, the Agreed Medical Examiner (AME) in orthopedics, and Dr. Gabriel, the AME in dentistry. She also referred, briefly, to the findings of Dr. Stalberg, the AME in psychiatry, but did not review his findings on applicant's psyche impairment.

Ms. Wilson reported that according to Dr. Berman, applicant's limitations for her right upper extremity are no forceful or repetitive lifting, pushing, pulling, grasping, twisting, fine and repetitive manipulative activities, such as prolonged and repetitive keyboard activities. Dr. Berman also precluded applicant from very heavy work. He noted applicant's complaints using her right upper extremity, including when engaged in bathing, showering, dressing and self-hygiene, and difficulty with household chores and grocery shopping.

In his July 6, 2015 Report, Dr. Berman concluded that applicant had lost 40% of her pre-injury capacity in her right upper extremity, resulting in a 24% WPI. He also assessed applicant with a 27% WPI for her cervical spine. (Jt. Ex. 8, 7/6/15 Dr. Berman AME Report, p. 30-31.) While he concluded that applicant could not return to her previous job, he did not find she was unable to return to the open labor market.

Ms. Wilson reviewed Dr. Berman's comments, noting applicant's subjective residuals to the cervical region and right upper extremity of intermittent and slight, reaching slight to moderate intermittently. She also noted that Dr. Berman found that while applicant had "limited mobility, there is no radiculopathy, and there has been no particular significant findings on imaging studies."

Dr. Berman noted objectively Ms. Dominguez has some limitation of right shoulder mobility; there is weakness, which is probably a pain response; there are right forearm scars; there is some right lateral elbow tenderness; there is some limitation of mobility in right wrist palmar flexion; she has stiffness to the right hand; there are still some slight moisture, which is improved; and she has coldness and sensory issues. Dr. Berman indicated there is a 50% loss of capacity for function such as lifting, reaching, pushing, grasping, twisting, and

manipulative activities as it relates to the right upper extremity.”
(Ex. 1, 6/15/17 Wilson Report, p. 24.)

Ms. Wilson reviewed the dental issues raised by Dr. Gabriel, applicant’s TMJ internal derangement syndrome, including locking of her jaw and bruxism, which he indicated were caused or contributed to by her orthopedic pain, and “the psyche, depression and emotional stressors secondary to those orthopedic pain issues.” Ms. Wilson noted applicant had difficulty with sleep due to pain, and was distraught about not being able to work and support herself financially. In his September 24, 2013 AME evaluation, Dr. Gabriel did not place any work restrictions on applicant and found she was not a qualified injured worker and has no need for vocational rehabilitation on basis of her dental injury. (Jt. Ex. 20, 9/24/13 Dr. Gabriel AME Report.)

Ms. Wilson determined applicant had “very few if any transferable skills,” as her prior work history was limited to 8 years as a housekeeping/nanny for her most recent employer, and 11.5 years as a nanny for two separate employers. Applicant has a 1st grade education from El Salvador and completed 1.5 years of ESL Adult education classes in 1995-96.

Ms. Wilson used vocational software to evaluate applicant’s ability to return to the labor force. She found no appropriate occupations for applicant when she entered into the vocational software program the medical limitations and/or industrial functional impairments discussed in the medical record, combined with applicant’s lack of transferable skills.

In assessing, both Ms. Dominguez’ physical work limitations and transferable skills McCroskey Volcano 16.0 software did not identify any occupations that are physically and emotionally appropriate for Ms. Dominguez in the open labor market within the Los Angeles geographical area in which, Ms. Dominguez had any of the transferable skills required for employment within the labor market for her.
(Ex. 1, 6/15/17 Wilson Report, p. 8.)

Ms. Wilson indicated that when performing an individualized assessment of applicant and whether industrial factors preclude applicant’s participation in vocational rehabilitation and returning to the labor market, her evaluation did not consider factors unrelated to applicant’s industrial injury, such as applicant’s education level, her lack of proficiency in English, and general economic conditions. She found applicant’s industrial injury and subsequent work limitations were the “only and direct cause” of her non-amenability to vocational rehabilitation.

Ms. Wilson then described applicant's limitations, deriving information from the medical record and from her interview with applicant.

Since her injury, Ms. Dominguez has difficulties conducting activities of daily living such as driving, shopping, cleaning, and cooking and requires constant assistance. In addition, due to her industrial injury, she has chronic pain caused by impairments and she experiences loss of concentration, memory difficulties, low energy levels, sadness, and agitation on a constant basis. During our meeting, Ms. Dominguez expressed that since her industrial injury she is in constant pain and is only able to sit for 15 to 20 minutes then she needs to stand because of neck pain, back pain, and pain that shots [sic] from her shoulders to her fingers. Ms. Dominguez noted she could only stand for 15 to 20 minutes then she needs to sit and rest. Ms. Dominguez expressed she can only walk for 10 minutes then she needs to stop and rest because of neck and low back pain. Agreed Medical Examiner Dr. Jeffrey A. Berman reported with regards to the right upper extremity, Ms. Dominguez is precluded from forceful as well as repetitive lifting, pushing, pulling, grasping, twisting, as well as fine and repetitive manipulative activities, these would include prolonged and repetitive keyboarding activities. Dr. Berman expressed concerning the cervical spine Ms. Dominguez has a very heavy work preclusion. (Ex. 1, 6/15/17 Wilson Report, p. 23.)

Ms. Wilson reviewed the diagnosis of Dr. Stalberg, the AME in psychiatry, noting that he "diagnosed applicant with a pain disorder associated with both psychological factors and a general medical condition, and depressive disorder NOS. Dr. Stalberg indicated at the time of his evaluation Ms. Dominguez is more disabled because one must take the pain into consideration and she has never received treatment. Per Dr. Dominguez [sic], Ms. Dominguez certainly needs antidepressants." (Ex. 1, 6/15/17 Wilson Report, p. 26.)

Ms. Wilson did not refer to Dr. Stalberg's concerns that he found applicant had exaggerated her complaints, where he stated "There was exaggeration and I will defer to Dr. Berman regarding her subjective pains as I now reject the total bodily pain complaints. The subjective pain complaints had exceeded the objective findings, which I reject." (Jt. Ex. 18. Dr. Stalberg, 11/2/15 AME Report, p. 5-6.) He also noted that he found a GAF of 55 and placed a restriction against stress, and provided a whole person impairment of 37%. While he also indicated that he did not believe applicant would return to work, he based that on the fact that applicant is a recipient of Social Security Disability, and therefore "has a one in 500 chance of returning to work." (Jt. Ex. 18, p. 6.)

DISCUSSION

Applicant asserts that her permanent disability rating should not have been based on a strict application of the AMA Guides, contending that she has rebutted the rating as the medical and vocational evidence in the record establishes she is not amenable to vocational rehabilitation and has experienced a total loss of future earning capacity. Applicant contends that the opinion of her vocational expert, Laura Wilson, supports her claim for permanent total disability on the basis that she is not amenable to vocational rehabilitation due solely to the effects of her industrial injury, and without consideration of impermissible factors.

The WCJ concluded that the report of applicant's vocational expert did not constitute substantial evidence to support applicant's claim that she has effectively rebutted the WCJ's rating of her permanent disability based on application of the permanent disability rating schedule. We concur with the WCJ's determination.

Labor Code section 4660 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), the proper application of the permanent disability rating schedule 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* at 1685.) A rating obtained pursuant to the permanent disability rating schedule may be rebutting by showing the diminished future earning capacity is greater than the factor supplied by the schedule. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119].) The court in *Ogilvie, supra*, addressed the question of: "What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning

capacity is different than the earning capacity used to arrive at the scheduled rating?” (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the schedule rating, and the one advocated here, is based upon a determination that the injured worker is “not amenable to rehabilitation and, for that reason, the employee’s diminished future earning capacity is greater than reflected in the scheduled rating.” The employee’s diminished future earnings must be directly attributable to the employee’s work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee’s lack of education. (*Ogilvie*, 197 Cal.App.4th at pp. 1274–1275, 1277).

As the *Ogilvie* Court acknowledged:

[C]ases have long recognized that a scheduled rating has been effectively rebutted ... 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].

Here, applicant argues that the vocational opinion of Ms. Wilson, based on the AME medical reports, establishes that she is permanently totally disabled because she is not amenable to vocational rehabilitation. She contends that the contrary conclusion of defendant’s vocational expert, Ms. Green, is not substantial evidence.

Our review of the record does not support applicant’s contentions.

First, applicant’s petition mischaracterizes the medical record. Applicant states that AMEs Dr. Stalberg and Dr. Berman found applicant to be 100% permanently disabled. (Petition for Reconsideration, 5:20-21; 6:4-7.) Applicant cited to a 2008 report by Dr. Stalberg. However, in his final report in 2015, Dr. Stalberg did not repeat that conclusion. Rather he found applicant had a 37% WPI on a psychiatric basis and placed a work restriction against stress. He found applicant’s claimed levels of pain were exaggerated and he “reject[ed] the total bodily pain complaints.” He did not conclude that applicant was unable to return to the labor force based on the effects of her industrial injury. Rather, he opined that applicant was unlikely to return to the work force due to the fact that she was now receiving Social Security disability benefits.

Applicant also quoted from Dr. Berman’s July 6, 2015 report to assert that he too found applicant to be 100% permanently disabled. However, Dr. Berman did not reach that conclusion. The language quoted in applicant’s Petition is from Dr. Berman’s summary of the report of a

treating psychiatrist, whose report is not in evidence. Dr. Berman indicated in his report that he rated applicant's impairment at less than 100%, and he did not find she was unable to return to the open labor market.

Indeed, in her review of the medical evidence, Ms. Wilson did not make the assertion that the evaluators found applicant to be permanently totally disabled. However, Ms. Wilson's conclusions on applicant's lack of amenability to vocational rehabilitation are based upon factors not supported by the medical evidence.

In concluding applicant's medical condition prevented her from participating in vocational rehabilitation, Ms. Wilson cited numerous subjective factors that are not included in the medical reporting. She referred to applicant's pain complaints, which Dr. Stalberg found to be exaggerated, and to her limitations on standing, standing and walking, limitations that no physician identified or designated as caused by the industrial injury. Indeed, the only limitations placed on applicant by Dr. Berman was on her use of her non-dominant right upper extremity, and for her cervical spine. He precluded applicant from using her right upper extremity for forceful as well as repetitive lifting, pushing, pulling, grasping, twisting, as well as fine and repetitive manipulative activities, such as prolonged and repetitive keyboarding activities. Dr. Berman also placed a preclusion from very heavy work for her cervical spine. Dr. Berman's work restrictions did not include any limitations on applicant's ability to sit, walk or stand due to the effects of her industrial injury. Ms. Wilson's conclusions about applicant's amenability to participate in vocational rehabilitation, based upon applicant's subjective limitations, are not supported by the record.

Additionally, though applicant admitted that her lack of education and limited use of English impaired her ability to find jobs, Ms. Wilson did not discuss how she segregated these non-industrial factors from her analysis of applicant's amenability to vocational rehabilitation.

On this record, we are persuaded that the WCJ did not err in finding the opinion of applicant's vocational expert was not substantial evidence to support applicant's contention that she had met her burden of proof to rebut the scheduled rating of her permanent disability.

Accordingly, we will affirm the Findings and Award and will deny applicant's Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the December 11, 2020 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 22, 2021

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

**ANGELA DOMINGUEZ
DULIO CHAVEZ ASSOCIATES
HALLETT, EMERICK, WELLS & SAREEN**

SV/pc

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