

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

ELLEN STRAUSS, *Applicant*

vs.

**BARRETT BUSINESS SERVICES;
ACE AMERICAN INSURANCE COMPANY, adjusted by CORVEL, *Defendants***

**Adjudication Number: ADJ10389789
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant Barrett Business Services, by and through its insurer, Ace American Insurance, administered by CORVEL, seeks reconsideration of the May 14, 2021 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant Ellen Strauss, while employed as an office manager at Master Builders, sustained an industrial cumulative trauma injury to her bilateral shoulders and wrists, and a station and gait disorder on December 15, 2015, resulting in 100% permanent disability. The WCJ also held the record was substantial medical evidence and that there was no need for a Qualified Medical Evaluator (QME) to replace Dr. Charles.

Defendant contests the award of 100% permanent disability based on the opinion of Dr. Charles. Defendant contends it was denied due process of law by the WCJ's failure to permit a new QME to consider its defense vocational rehabilitation report of Mr. Simon, after the death of QME Dr. Charles, who was thus unable to address whether Mr. Simon's reporting would change his opinion that applicant is permanently totally disabled. Defendant contends that it was denied the opportunity to further depose Dr. Charles with regard to his opinion of the defense vocational report. Defendant asserts that it is "reasonably probable" that it would have obtained "a more favorable result" had the WCJ allowed a new QME to review the defense vocational rehabilitation reporting, and that the WCJ's opinion that Dr. Charles would likely not have changed his opinion violates defendant's due process rights. Defendant further argues that the record is not adequate to

support the WCJ's findings because Dr. Charles did not review Mr. Simon's report. Defendant next contends that the WCJ's statement in her Opinion on Decision, that both vocational experts found applicant was not amenable to vocational rehabilitation, is not an accurate characterization of the evidence, as defendant asserts Mr. Simon stated that applicant would be amenable to rehabilitation if she worked a sedentary, part-time job from home using voice activated software. Defendant also asserts the WCJ mischaracterized the record by stating that neither vocational expert left any question of applicant's medical status or suggested further development of the record.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the Answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of June 29, 2021, which considers, and responds to, the defendant's contentions regarding the evidentiary basis for finding applicant is permanently totally disabled. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Findings and Award, and deny the petition for reconsideration.

Additionally, we are not persuaded that the WCJ erred in disallowing the appointment of a new QME to replace Dr. Charles, or that this disallowance caused any deprivation of defendant's right to due process of law. Defendant's argument that it is "reasonably probable" that it would have obtained "a more favorable result" had a new QME been appointed to evaluate Mr. Simon's reporting, fails to address the significance of the Functional Capacity Evaluation (FCE) by Dr. Bubanja, which found applicant was *unable to perform sedentary work*, and which led Dr. Charles to conclude applicant was permanently totally disabled. There are substantial flaws in Mr. Simon's reporting that render it unpersuasive and not substantial evidence.

According to Dr. Bubanja's report of the results of the FCE, applicant has marked reduction in her range of motion and muscle strength in her bilateral shoulders. She lacks finger dexterity, and was unable to perform manual dexterity testing with either upper extremity, which demonstrated a slow work pace that would impact her work performance and competitive speed. Her grip strength was measured at 19% and 25%, and her pinch grip strength was 17% and 19%, of age/gender adjusted norms for her left and right hands. She was unable to use her left arm to perform reaching and manipulation due to her range of motion limitations, poor activity tolerance and poor neuromuscular timing. Using her right arm, she could not reach above 70 degrees of

flexion, and reaching at waist level was limited to a few seconds before she required a break. She was unable to lift any weight with her left arm, and only 1 pound with her right arm. She could not carry any weight with either arm due weakness, poor shoulder stability, and pain and safety issues. Applicant was observed to have significant typing limitations, measured at “a non-competitive speed” of 11 words per minute, using only two fingers on her right hand. Applicant reported pain in her right shoulder during the testing. She required the use of a walker to prevent falls when she experiences sudden spasms in her shoulder.

Dr. Bubanji concluded:

The FCE found that Ms. Strauss was unable to meet the performance standards related to maintaining a regular work schedule with reasonable continuity, and appropriate persistence and pace. Given the exertional requirements identified by the physical demand level (PDL) classification as defined by the Dictionary of Occupational Titles published by the United States Department of Labor, it is my professional opinion to a reasonable degree of probability, that Ms. Strauss does not meet any of the physical demands and physical stamina of Sedentary work classification.

Dr. Charles agreed with Dr. Bubanji’s assessment of applicant’s physical and vocational limitations, and found applicant to be permanently totally disabled.

Defendant’s vocational expert, Mr. Simon, however, concluded that applicant *may* be amenable to vocational rehabilitation in the form of direct placement in part-time, sedentary or home-based employment, with the use of voice activated software. However, he fails to explain what led him to this conclusion. While Mr. Simon reviewed Dr. Bubanji’s assessment, he never addressed her conclusion that applicant was not capable of performing sedentary work, the least demanding work classification. Mr. Simon also summarized, but did not use, Dr. Charles’ restrictions in his 12/12/2018 report, that applicant was “unable to perform activities with the left arm, minimal use. Unable to perform forceful grasping, severely restricted in all ranges of motion for the left shoulder. Restricted from pushing, pulling, lifting greater than 2 pounds on the left. Able to use arms above chest level.” Rather, Mr. Simon used Dr. Charles’s sedentary work restriction “with occasional use of the upper extremities” to evaluate applicant’s vocational limitations. All of the occupational matches Mr. Simon identified were sedentary positions that involved clerical work. All of these occupational categories would require greater physical capacity and persistence than the FCE found applicant was capable of performing.

Mr. Simon concluded that applicant was capable of employment in the competitive labor market based on her use of voice activated computer software, stating: “In this case, Ms. Strauss may be amenable for return to part-time, sedentary or home-based employment, with the assistance of voice activated software.” No where in his report does he describe applicant’s actual physical ability to engage in such employment. At trial, applicant testified¹ that she is able to use her computer to read her emails with voice activation, but she does not use it very much, only for five to ten minutes at a time, and she places online orders “maybe once a week, if that.” The longest she has been able to use her computer at one time is “maybe twenty minutes.” She testified that it is difficult sometimes to use voice activation. As Dr. Bubanja reported, applicant can only use one hand to type, and applicant testified it has become harder with her carpal tunnel syndrome. Mr. Simon provided no explanation for how applicant, who uses her computer in five to ten minute sessions, would be able to engage in competitive clerical employment when she is unable to use her left arm, and has very limited dexterity to reach for, grasp and pick up lightweight items with her right arm.

Mr. Simon’s vocational report cannot be found to constitute substantial evidence as it is not based on applicant’s actual work limitations, and disregards the limitations found by Dr. Bubanji and Dr. Charles, that applicant cannot even meet the demands of sedentary work. Mr. Simon’s opinion that applicant is amenable to vocational rehabilitation by engaging in direct placement in home-based employment is not supported by her actual work limitations. Thus, defendant’s complaint that it was denied due process of law because the record lacks a medical review of Mr. Simon’s vocational report is not justified. A medical review of Mr. Simon’s report would not result in a more favorable outcome for defendant.

Accordingly, we will affirm the WCJ’s Findings and Award and will deny defendant’s Petition for Reconsideration.

¹ Applicant’s trial testimony detailing the limitations on her activities of daily living caused by her industrial injury provides compelling corroboration of the FCE that she is severely limited in her ability to engage in competitive work activities. (See Minutes of Hearing, 3/9/20, p. 8-12.)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the May 14, 2021 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 3, 2021

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

**ELLEN STRAUSS
BOXER & GERSON
PARK GUENTHART**

SV/pc

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I. INTRODUCTION

Date of Injury:	12-15-2015
Occupation:	office manager, group 112
Parts of Body Injured:	bilateral shoulders, bilateral wrists, and station and gait disorder
Petitioner:	Defendant Corvel Sacramento
Timeliness:	The petition was timely filed on 06-07-2021
Verification:	The petition was verified

Petitioner’s Contention: Defendant contends that a replacement QME panel should be granted as QME Dr. Michael Charles passed away and the medical record is incomplete, specifically, the QME did not review defendant’s vocational report by expert Scott Simon. Defendant further appeals the conclusion that Mr. Simon’s report shows that applicant is not amenable to vocational rehabilitation but instead contends that Mr. Simon’s report shows that applicant is amenable to rehabilitation in form of part-time work or in the alternative, defendant’s vocational expert supports further development of the record.

II. STATEMENT OF FACTS

Applicant Ellen Strauss was injured on 12-15-2015 while working as an office manager for defendant employer Master Builders. She was age 68 years old on the date of injury. The claim is handled by defendant-petitioner Corvel Corporation. Applicant slip and fell, injuring her left shoulder and left arm. She received treatment on the day of the injury and the day after the accident, applicant underwent closed reduction of the left shoulder under anesthesia. (Minutes of Hearing/Summary of Evidence of Trial 03-09-2021, “MOH/SOE,” at p. 6, lines 15-16 and p. 7 lines 24-31.) Subsequently, applicant has a closed reduction procedure on 01-05-2016 and then a reverse total left shoulder replacement on 02-22-2016. (MOH/SOE at p. 7, lines 19-26.) Applicant developed symptoms in her right shoulder, right hand, and bilateral wrists. (MOH/SOE at p. 6, lines 30-31 and p. 7, lines 1-4.)

The first QME in this case was Dr. Joel Renbaum. Dr. Renbaum issued two QME reports before he became unavailable as he decided not to renew his QME license. Subsequently, in or around 2018, Dr. Michael Charles replaced Dr. Renbaum as the QME in this case. Dr. Renbaum’s reports were not admitted as evidence, but were reviewed and summarized by Dr. Charles who

notes that in the first report of 12-08-2016, Dr. Renbaum first rated applicant's left shoulder at 31% WPI and in a supplemental QME report dated 02-12-2017, Dr. Renbaum provided applicant with a 2% WPI for the *right* shoulder. (Ex. 101 at p.28 and p. 29.) Applicant's condition changed, and in a supplemental report of 07-27-2017, Dr. Renbaum opined that applicant became temporarily disabled as of 06-14-2017 with treating physician Dr. Alwattar recommended additional surgery. (Id., at p. 33.)

QME reports and a deposition by Dr. Charles were admitted as Joint Exhibits 101 through 105. Dr. Charles' last report in this case is dated 12-05-2019, Joint Exhibit 104. Dr. Charles' passing in September of 2020 rendered him unavailable for further reporting. Defendant's request for a replacement QME panel is memorialized in a letter of 09-23-2020. (Ex. C.)

It appears there is no dispute that Dr. Charles provides a ratable report under the *AMA Guides, 5th Edition*. Dr. Charles' report dated 12-12-2018 provides 39% WPI for right shoulder at and 40% WPI for the left shoulder. (Ex. 102 at p. 10.) The rating in the Opinion on Decision was as follows:

16.02.02.00 – 39 – [1.4]55 – 112H – 61 = 71% (right upper extremity)

16.02.02.00 – 40 – [1.4]56 – 112H – 62 = 71% (left upper extremity)

CVC = 92

The QME report of 12-12-2018 indicates pain level of 10/10 for the left shoulder and “no strength” and for the right shoulder there is “constant soreness” and her shoulders prevent activities of daily living. (Id., at p. 3.) According to Dr. Charles, applicant “is unable to perform activities with the left arm, minimal use” including no ability to perform forceful grasping and her range of motion is “severely restricted in all ranges of motion.” (Id., at p. 11.) For the right shoulder, she can perform some grasping as long as it is not forceful. (Id.) For both arms, applicant cannot push, pull, use above chest level and she is limited to lifting of 5 pounds for the right arm and two pounds for the left. (Id.)

Dr. Charles also diagnoses includes station and gait disorders secondary to left shoulder dysfunction. (Id., at p. 8, 9.) He notes that applicant uses a walker so support herself when she has sudden pains from the left shoulder. (Id.) In the report of 12-12-2018, Dr. Charles questioned whether applicant could return to the open labor market:

“Consideration for a functional capacity evaluation by either Tom Kowalski or Diana Bubanja, both very reputable and well utilized functional capacity

evaluators should be considered in this case as there is concern as to what type of work this patient may be able to return to in the open labor market.” (Id., at p. 11.)

At the QME’s request, applicant underwent a Functional Capacity Evaluation (“FCE”) with Diana Bubanja on 07-23-2019. Ms. Bubanja concluded that applicant was unable to meet performance standards relating to maintaining regular work schedule with reasonable continuity and appropriated persistence and pace. (Ex. 2 at p. 18.) As such, Ms. Bubanja opined that applicant could not meet any physical demands of sedentary work. (Id.) Defendant did not object to or rebut the FCE report.

After review of Ms. Bubanja’s report, Dr. Charles opined that applicant is 100% permanently totally disabled from an orthopedic perspective. (Ex. 104 at 2.) In addition, the QME opined that based on review of medical records and testing, applicant subsequently developed carpal tunnel syndrome as a compensable consequence as the result of use of a walker. (Id.)

Applicant procured a vocational report by Jeff Malmuth, who evaluated applicant in May of 2020, and defendant procured a rebuttal vocational report by Scott Simon, who evaluated applicant on 07-27-2020. In essence, Mr. Malmuth opines that due to functional limitations and chronic pain, applicant cannot compete in the open labor market. In addition, applicant would not be successful in on the job training due to a lack of capacity to perform at a minimum standard of productivity on ongoing and sustained manner in a competitive environment. (Ex. 1 at pp. 69, 72.) Mr. Malmuth bases his findings on the QME and the FCE.

For defendants, the expert Mr. Simon evaluated applicant on 07-27-2020, administering testing. Preinjury, applicant had performed light work according to Mr. Simon. (Ex. A at p. 14.) Occupations within applicant’s experience include credit authorizers, checkers; clerks and reservation and transportation ticket agents and travel clerks; customer service representatives; receptionists and office clerks. (Id.. at p. 16- 18.) However, after testing, Mr. Simon concluded at page 19 of his report under “Educational Retraining:”

“In my opinion, applicant is not likely amenable for educational retraining at this time. A score at the 17th percentile would not support retraining efforts.”
(Id. at p. 19, emphasis by italics in original.)

At trial, applicant testified credibly to her limited ability and function. She has extreme difficulty in performing simple activities of daily living, including self-hygiene. Her inability to

lift her left arm means that she cannot properly wash her hair or shower. She uses assistive devices to dress herself and can no longer wear sweaters or shirts that go over the head or require buttoning. On occasion, she needs assistance for a neighbor with fasters or ties and accessories such as earrings. She cannot tie her shoes, and slips them on. She keeps her meals simple; she formerly enjoyed cooking but now she cannot use a knife to cut food.

Applicant was employed as an office manager and any office job requires use of a computer. With regard to operating her personal computer, applicant can use hers only as long as 20 minutes at a time. (MOH/SOE at p. 14, lines 1-6; p. 15, lines 3-16.) She has voice-activated software and testified that she must use the keyboard to correct and edit the text. (Id.) Sitting for more than 15 minutes is also difficult. (Id., at p. 13, lines 25-30.) Applicant is unable to engage in any activity involving her upper extremities for any significant period.

Based on the foregoing, an Award of 100% issued by Findings and Award on 05-14-2021.

Following the Petition for Reconsideration, on 06-21-2021, applicant filed an Answer to the petition.

III. DISCUSSION

In *Ogilvie v. Workers' Compensation Appeals Board* (2011) 76 Cal. Comp. Cases 624, the Court of Appeal held that it was permissible to depart from the scheduled rating by use of vocational expert evidence to show an injured worker has a greater loss of future earnings capacity than reflected in the scheduled rating. The most common way to rebut the rating is by showing that the injured worker is *not* amenable to rehabilitation due to the industrial injury, and therefore has suffered a greater loss of future earnings capacity than reflected in the scheduled rating. This is the rule established in *Le Bouef v. Workers' Compensation Appeals Board* (1983) 48 Cal. Comp. Cases 587. The rating for the shoulders alone is 92%.¹ Given the severe limitations outlined by Dr. Charles for applicant's bilateral upper extremities, Dr. Charles recommended a FCE. After consideration of the FCE by Ms. Bubanja, Dr. Charles opines that applicant is 100% from an orthopedic perspective. Defendant did not contest the FCE report nor did they depose Ms. Bubanja.

¹ In the Answer, applicant includes ratings including the bilateral wrists which rate 35% after adjustment for age and occupation and contends that the CVC rating is 93%.

The totality of the evidence supports the fact that applicant is not vocationally feasible. It was Dr. Charles who originally suggested that applicant is not vocationally feasible in December of 2018. (Ex. 102.) Applicant enlisted Mr. Malmuth as her vocational expert who issued his report on 05-15-2020 finding the same. (Ex. 1.) Defendants obtained a rebuttal vocational report by Mr. Simon, but not until 09-16-2020. (Ex. A.) Defendant's expert Mr. Simon opines that "applicant is not likely amenable for educational retraining at this time." (Ex. A at 19.) In essence, Mr. Simon agrees that applicant is not amenable to vocational rehabilitation *at this point in time*. At trial, applicant affirmed her condition as reported by the QME as well as the severe limitations in her abilities as described by the FCE. It has been over five years since the date of injury. There is no indication that circumstances will change in the future.

Petitioner contends that Mr. Simon's opinion that applicant "may be amenable for rehabilitation" and a return to sedentary part-time work using voice-activated software but this statement does not support a conclusion that applicant is vocationally feasible. (Ex. A at p. 28.) The use of voice-activated software is not supported by the record. As stated above, applicant testified that some keyboarding is required when using voice-activated software and to her difficulty operating a computer. The FCE by Ms. Bubanja shows applicant's finger dexterity at less than the 1st percentile. (Ex. 2 at p. 17.) The FCE shows that applicant's ability to keyboard is a "non-competitive speed of 11 WPM, using only her right hand to type." (Id., at p. 18.) In addition, applicant has no ability to sit before a computer for prolonged periods. (Id., at p. 16.)

Petitioner contends that Dr. Charles did not consider home occupations, work hardening, part-time work, or ergonomic assistance raised by Mr. Simon as avenues for applicant to return to the workforce. (Ex. A at p. 24.) However, these are *vocational* possibilities and are not in the purview of the *medical* expert. That is, Mr. Simon should have addressed these possibilities himself within the restrictions defined by the QME and the FCE. In this respect, the QME would have nothing to add. In reality, defendant's expert supports an optimistic *possibility* that applicant will be vocational feasible in the future, but this is far from any sort of certainty or even any *probability*. As such, Mr. Simon's report is not persuasive. Based on the evidence, applicant is not amenable to vocational rehabilitation and is entitled to an award of 100%.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be **DENIED**.

DATE: 06-29-2021

Therese Da Silva

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE