

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

BERTHA VAZQUEZ, *Applicant*

vs.

**RALPHS GROCERY COMPANY; permissibly self-insured, administered by SEDGWICK
CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ3550890 (LAO 0850144)
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Defendant seeks reconsideration of the Amended Findings of Fact, Award and Orders (F&A), issued by the workers' compensation administrative law judge (WCJ) on September 3, 2019, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her neck and psyche, that applicant was temporarily totally disabled for the period from September 23, 2003, through May 4, 2015, and that as a result of the injury applicant is permanently totally (100%) disabled.

Defendant contends that based on the September 25, 2005 Findings and Award applicant's temporary total disability started on October 14, 2004; that the reports of orthopedic qualified medical examiner (QME) Hose Kim, M.D., are substantial evidence that applicant did not sustain an industrial injury to her neck; that applicant's psychiatric condition was permanent and stationary in 2007; that the reports from vocational counselor Laura Wilson are not substantial evidence; and that based on the opinion of psychiatric agreed medical examiner (AME) Raymond J. Friedman, M.D., applicant's injury caused 30% psychiatric disability.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

¹ We had previously issued an Opinion and Order regarding this matter (ADJ3550890) on January 17, 2006. The members of that panel no longer serve on the Appeals Board and other Commissioners have been assigned in their place.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her neck, left upper extremity, and psyche, while employed by defendant as a clerk during the period September 23, 2002, through September 23, 2003.

The WCJ's summary of applicant's September 14, 2005 trial testimony states:

The Applicant testified that she began working for Ralphs in 1999 as a clerk helper. Her last day of work was September 24, 2003. She was taken off of work by a psychologist, Dr. Fierro, who was treating her for stress. She first saw Dr. Fierro approximately six months prior to her termination. She treated with him through a union referral and her union insurance paid for his treatment. ¶ When she first started treating with this doctor, she related to him that she was having problems with her boss Rodney Yee, who was the store director/store manager and the most senior person in the store.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), September 14, 2005, p. 5.)

In the September 29, 2005 Findings and Award, the WCJ found that applicant sustained a psychiatric injury AOE/COE, that applicant was temporarily totally disabled "from October 14, 2004 to the present and continuing," and all other issues were deferred. (See Appeals Board Exh. A, Findings and Award/Opinion on Decision, September 29, 2005.)

On February 3, 2015, AME Dr. Friedman evaluated applicant. (Court Exh. K, Dr. Friedman, May 4, 2015.) Dr. Friedman reviewed the history given by applicant to his associate Leine Delker, Ph.D., he reviewed the medical record and performed a mental status examination. The doctor's conclusions included the following:

Based on data in the medical records, we find that her psychiatric condition reached permanent and stationary status in approximately 2008. Apparently, there have been periods of temporary disability with psychiatric symptoms as indicated by Arturo Fierro, Ph.D., and Oscar Valdez, M.D., per the medical record. (Court Exh. K, p. 52.)

The evidence indicates that there have been periods of temporary disability with psychiatric symptoms, although we cannot be sure of the dates. ... ¶ ... Based on data from the medical records, we assess that Ms. Vasquez's psychiatric

condition reached permanent and stationary status in approximately 2007. ... ¶
The available data indicates that her psychiatric symptoms have remained chronic for some time and her psychiatric condition is permanent and stationary. ¶ We are rating Ms. Vasquez with a Global Assessment of Functioning score of 53. She consistently exhibits moderate psychiatric symptoms, including severe social withdrawal, tangential thinking, intermittent suicidal ideation, impaired concentration, tearfulness, and anxiety. (Court Exh. K, p. 53.)

Based on the available evidence, we find the following: We apportion 70 percent of Ms. Vasquez's psychiatric disability to the stress and harassment she experienced while working for Ralphs [sic] Supermarket. We apportion 30 percent to a pre-existing vulnerability to depressive symptoms resulting from a stressful family situation, two ectopic pregnancies, and dependent personality traits. (Court Exh. K, p. 55.)

Dr. Friedman's deposition was taken on June 9, 2016. (Court Exh. H, Dr. Friedman, June 9, 2016, deposition transcript.)² The doctor's testimony pertaining to the issues of temporary disability and the permanent and stationary date includes the following:

Q. ... Did you outline the periods of temporary disability in either of your two reports?

A. Well, I believe in the end I felt it was not possible. Didn't I say that in the discussion section?
(Court Exh. H, p. 8.)

Q. ... So which mental health professional did you depend on to reach your rating of 2007?

A. I'm looking. I'm trying to find that. ... ¶ ... I think it's probably in the reporting of other mental health professionals who did and whose records we didn't have initially.

Q. But, Doctor, if you didn't have the records, how could you rely on that?

A. Well, the description of her behavior, I mean, can be determinative, if she's hospitalized, if she's — you know, most recently threatening to shoot herself when she's mad at her husband.

Q. That was in 2014.

A. Those are short periods of TTD.
(Court Exh. H, pp. 9 - 10.)

Q. ... Are you saying that after that permanent and stationary, there are periods where she could have become totally disabled again or temporarily totally disabled?

² We note that Dr. Friedman was previously deposed on November 12, 2015 (Court Exh. J), and he submitted a supplemental report on January 25, 2016. (Court Exh. I.) Those exhibits do not contain information relevant to the issues being addressed herein and will not be further discussed.

A. Yes. I mean, if you -- but would that really be a period of TTD, or would that be a period of just intermittent total dysfunction set against a chronic background of impaired -- significantly impaired function?
(Court Exh. H, p. 13.)

A. Well, I think certainly the times she was hospitalized in '08 and 2014 for a few days, she was TTD. ...

Q. So basically what you're saying is that her permanent and stationary state would include periods where she would have flareups where she would be totally disabled; correct?

A. Yes.

Q. That's her permanent and stationary state?

A. Yes.

(Court Exh. H, p. 14.)

Q. ... Dr. Friedman, did you form an opinion as to whether or not the lady you met with could compete in the open labor market for employment? ...

A. She might in an almost sheltered environment be able to work, but otherwise she couldn't. She couldn't be around people. That's why I thought the factors would be more helpful in understanding the nature of her disability, the degree of it. ¶ Anything around people, though, would be — she would start to decompensate. She'd become totally disabled. But if she could have some type of job where maybe she worked alone - - it's hard to imagine what that would be.

(Court Exh. H, p. 21.)

Q. Doctor, would you agree that any exacerbations — similar to a person who has a knee injury after they're permanent and stationary, anything, maybe they aggravated it playing volleyball or something — for this individual, anything like her hospitalizations would be part of her future medical and not necessarily alter her permanent and stationary date?

A. Yeah. That's essentially consistent with what I'm saying.

(Court Exh. H, p. 47.)

Q. What applicant's counsel is trying to get to is that she's unemployable.

A. No. The way I rated the factors doesn't make her unemployable at all. It makes it difficult for her to work.

(Court Exh. H, pp. 48 – 49.)

Regarding apportionment, Dr. Friedman's testimony included:

Q. Doctor, does it matter to your apportionment that the ectopic pregnancies occurred after the P&S date?

A. That's a good question. I don't want to say she's P&S in 2007 or '8 if they occurred after that. ¶ That would be somewhat inappropriate to apportion to them.

Q. That's why I asked, Doctor.

A. Let me think about that.

MR. TAYLOR: You have to take her as a whole, Doctor.

THE WITNESS: What?

MR. TAYLOR: You still have to take her as a whole.

THE WITNESS: Did I apportion 20 to the preexisting and 10, or did I lump them all together?

BY MR. MOORE: Q. Right. You said 30 percent to the three things, 70 percent industrial. That's how your report reads.

A. That creates an internal contradiction.

MR. TAYLOR: Not necessarily.

THE WITNESS: It does make sense, but - - well, if I'm rating her- - if I'm rating her in 2008 with that level of apportionment and that level of GAF, how can I say something subsequent contributed a greater percentage to the maintenance of that GAF when, I mean, the GAF was caused originally by her own inner weakness and then the work-related trauma? ¶ I can't -- how do I handle that? I'd have to increase the apportionment if I was being -- if I was -- if you were to ask me, "When you rated her"- - I'm thinking out loud - - rated her at this level and apportioned 30 percent or - - ¶ I think I would have to back out some of the apportionment. I don't know any way not to. You can't rate her at a point in time when part of what I'm apportioning to hasn't happened yet. That doesn't seem logical or - -

MR. TAYLOR: You saw her in 2015. You rated her in 2015. You have taken her as a whole, and you're using nonindustrial factors to apportion to. I don't see the problem with that.

THE WITNESS: I'm P&S-ing her - -

MR. TAYLOR: P&S-ing and rating are totally different. P&S, whether they are permanent and stationary, TTD, what their GAF score is, that's totally irrelevant.

THE WITNESS: So apportionment wouldn't apply at the time that she's rated P&S?

BY MR. MOORE: Q. In my opinion it should, because if you find her 53 GAF in '07, when she had not had - - it couldn't contribute to that; right?

A. Right. I don't know how to get around it.

Q. The question is do you -- what percentage did you apportion to the pregnancies?

A. About 10.

Q. So that would have to be taken out?

A. Yes, I think it would.

Q. So we'll have what, 80/20 now?

A. Yes.

(Court Exh. H, pp. 32 – 35.)

The parties proceeded to trial on August 10, 2017. Applicant testified, exhibits were accepted into evidence, and the issues submitted for decision included parts of body injured, temporary disability, permanent and stationary date, and permanent disability/apportionment. (MOH/SOE, August 10, 2017.) The WCJ vacated the submission and ordered that the parties further develop the record. At the May 30, 2019 trial additional exhibits were admitted into evidence, the matter was subsequently referred to the DEU for a formal rating and submitted for decision. A Findings of Fact, Award and Orders was issued on August 21, 2019, and the F&A was issued on September 3, 2019.

DISCUSSION

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess, and to be substantial evidence the medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647].)

In his May 4, 2015 report, Dr. Friedman stated:

Based on data in the medical records, we find that her psychiatric condition reached permanent and stationary status in approximately 2007. There have been periods of temporary disability with psychiatric symptoms as indicated by Arturo Fierro, Ph.D., and Oscar Valdez, M.D., per the medical record. (Court Exh. K, p. 57.)

As quoted above, at his deposition Dr. Friedman testified that it was not possible to identify periods of applicant's temporary disability. (Court Exh. H, p. 8.) He then said that after becoming permanent and stationary, there could be periods of temporary total disability, but those could be periods of "just intermittent total dysfunction." (Court Exh. H, p. 13.) Dr. Friedman later testified

that applicant's permanent and stationary state would include "flareups where she would be totally disabled." (Court Exh. H, p. 14.) We also note that although Dr. Friedman stated that the "industrial component" of applicant's disability would make her unemployable (Court Exh. H, p. 25), he later stated that, "The way I rated the factors doesn't make her unemployable at all. It makes it difficult for her to work." (Court Exh. H, pp. 48 – 49.)

Further, Dr. Friedman's testimony about apportionment indicates that he is not clear as to whether apportionment is applied at the permanent and stationary date or the date of the evaluation. (See e.g. Court Exh. H, p. 33, quoted above.) In order to constitute substantial evidence as to the issue of apportionment, the medical opinion must disclose the reporting physician's familiarity with the concepts of apportionment and must delineate the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*)). Also, the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Id.* at 621, underlining added.)

As an AME, Dr. Friedman was presumably chosen by the parties because of his expertise and neutrality. Therefore, his opinion should ordinarily be followed unless there is a good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) However, for the reasons discussed above we are unable to determine his opinions and/or the basis for opinions regarding the period (or periods) that applicant was temporarily totally disabled, the date applicant's condition became permanent and stationary, the level of permanent disability caused by applicant's psychiatric injury, and apportionment to non-industrial factors. Thus, Dr. Friedman's reports and deposition testimony do not constitute substantial evidence as to these issues.³

The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) When the medical record requires further development, the record should first be supplemented

³ In turn, any vocational expert reports based on review of Dr. Friedman's reports and deposition testimony do not constitute substantial evidence.

by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Upon return of this matter, we recommend the parties request that Dr. Friedman submit a supplemental report clarifying his opinions on the issues discussed above.

Finally, we note that after reviewing the same diagnostics (MRI and x-rays), orthopedic QME Dr. Kim and orthopedic QME Dr. Capen reached opposite conclusions as to whether applicant sustained an orthopedic injury AOE/COE. (See App. Exhs. 19 and 20; Def Exhs. R and U.) Having reviewed the reports from both doctors, it is not clear why they have such contradictory medical opinions, nor is it clear which doctor's opinions are substantial evidence. Based thereon, we recommend that the parties have applicant evaluated by an orthopedic AME or in the alternative, that they request the WCJ appoint a regular physician to conduct an orthopedic evaluation. (Lab. Code § 5701.)

Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 3, 2019 Amended Findings of Fact, Award and Orders, is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 8, 2022

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

**BERTHA VAZQUEZ
MICHAEL SULLIVAN & ASSOCIATES
MOORE & ASSOCIATES**

TLH/pc

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