

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

ISRAEL REYES, *Applicant*

vs.

**CITY OF GUADALUPE POLICE DEPT, permissibly self-insured, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ12263514
Oxnard District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award and Order (F&A), issued by the workers' compensation administrative law judge (WCJ) on November 1, 2021, wherein the WCJ found in pertinent part that while employed by defendant applicant sustained injury arising out of and in the course of employment (AOE/COE) to his heart, cardiovascular system, and respiratory system, that applicant's permanent disability is more accurately found based on adding the adjusted permanent disabilities rather than combining them, and that as a result of the injury applicant suffered 100% permanent and total disability.

Defendant contends that the adjusted permanent disabilities should be combined, not added, and that applicant did not claim injury to his respiratory system and there is no evidence in the record to support a finding of injury to applicant's respiratory system.

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

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 deny reconsideration.

BACKGROUND

Applicant claimed injury to his heart, cardiovascular system, and respiratory system, while employed by defendant as a police officer during the period from April 1, 2005, through February

16, 2019.

Internal medicine agreed medical examiner (AME) Mark H. Hyman, M.D., evaluated applicant on September 26, 2019. Dr. Hyman examined applicant and took a history. The diagnoses of conditions “presumed in part industrially related” were: hypertensive heart disease with concentric hypertrophy, myocardial infarction, heart failure secondary to concentric hypertensive heart disease, carotid arterial disease, and ankle swelling secondary to heart failure; and the respiratory difficulties/pneumonia, were “presumed industrially related.” (Court Exh. F. Dr. Hyman, September 26, 2019, p. 8.) Dr. Hyman noted that he would need to review the medical record in order to address permanent disability and other issues as to applicant’s cumulative injury claim.

After reviewing the medical records he was provided, Dr. Hyman stated that applicant’s condition had reached maximum medical improvement/permanent and stationary status on the date of the previous evaluation, September 26, 2019. (Court Exh. E, Dr. Hyman, October 7, 2019, p. 3.) He assigned 50% whole person impairment (WPI) for the hypertensive heart disease with cardiomyopathy, heart failure and left ventricular hypertrophy, 10% WPI for the coronary heart disease, and 6% WPI for the carotid arterial disease. Dr. Hyman then stated:

Please note that the impairment ratings for this gentleman's cardiovascular condition do take each other into account in order to arrive at a fair impairment rating. Further, please note, that this gentleman's conditions constitute a more advanced impact on his cardiovascular condition and thereby, by a KITE analysis, would be additive.¹

(Court Exh. E, p. 4.)

Dr. Hyman subsequently received an extensive medical record and based on his review of the record he stated that applicant had experienced “unprovoked deep vein thrombosis and pulmonary embolization.” (Court Exh. D, Dr. Hyman, November 20, 2019, p. 2.) He then assigned 2% WPI for the lower extremity deep vein thrombosis and 4% WPI for the pulmonary embolization. (Court Exh. D, p. 3.) Dr. Hyman submitted a second report dated November 20,

¹ The “Kite analysis” referred to by the doctor states that the disability values of multiple impairments may be added instead of combined using the combined values chart if adding the impairments provides an accurate rating of the injured worker’s disability, particularly when there is no overlap, and when the synergistic or additive effect of the multiple disabilities support that method of combination. *Athens Administrators v. Workers’ Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ den.); see also *De La Cerda v. Martin Selko & Co.* (2017) 83 Cal.Comp.Cases 567 (writ den.).

2019, which was a 215 page summary of the “6,798 pages” of medical records he had reviewed. (Court Exh. D, Dr. Hyman, November 20, 2019, p. 1.)

Dr. Hyman’s deposition was taken on January 28, 2020. (Court Exh. J, Dr. Hyman, January 28, 2020, deposition transcript.) The deposition had to be ended before it was actually complete, and the second deposition was taken on February 12, 2020. (Court Exh. I, Dr. Hyman, February 12, 2020, deposition transcript.) The interrogation and answers included:

Q: That’s what I’m trying to figure out, because you are choosing to add it, and I am assuming it’s because, essentially, the heart is not able to compensate because it has hypertensive heart disease, coronary artery disease, and cardiomyopathy. Essentially, the impact on his heart is more significant than if it was just one of those.

A: That’s correct.

Q: So combining the impairments isn’t really - - using the CVC wouldn’t be an accurate reflection of his heart because his heart is actually in a worse condition because of all these conditions.

A: Correct.

(Court Exh. I, pp. 56 – 57 [EAMS pp. 22 – 23].)

Dr. Hyman received “Sub Rosa videotapes” to review and after reviewing the videotapes he explained:

These videos show simple mild activities of daily living. These videos would be consistent with his history and diagnoses. To answer the questions propounded in the cover letter, I do affirm my prior opinion that his heart condition is multifactorial. I also affirm that his heart conditions are part of the cumulative trauma injury and finally, I affirm that the additive impact using the Kite method is appropriate given his medical conditions as previously discussed and explored. ¶ There would therefore be no change in my past reports and opinions. (Court Exh. C, Dr. Hyman, April 28, 2020, p. 2.)

Dr. Hyman was again deposed on July 29, 2020. At the end of the deposition he testified that he had not changed his previously stated opinions. (Court Exh. H, Dr. Hyman, July 29, 2020, deposition transcript, p. 80 [EAMS p. 13].)

In his February 10, 2021 supplemental report, Dr. Hyman stated:

The question regarding this gentleman's KITE analysis reflects the fact that when an individual has multiple parts of the cardiovascular system impacted from different processes, they cause each of the processes to struggle further than a standalone isolated condition. As an example, if the heart has to pump to overcome high blood pressure versus when the heart has to pump to overcome high blood pressure and ischemia, those are additive effects on the

cardiovascular system. It is for these reasons as explored in all my past reporting why I identified his advanced condition as being considered additive in nature. (Court Exh. B, Dr. Hyman, February 10, 2021, p. 2.)

After reviewing additional medical records, in his March 15, 2021 supplemental report, Dr. Hyman stated:

... [W]hether or not addition is permitted is a legal determination. Further, the AMA Guides does recognize that impairment ratings can be based on altered anatomy when that better describes somebody's condition whether or not there is an impact on the activities of daily living. Whether or not this negates the permission to add the impairments is a legal determination, not a medical determination. On a medical basis, when you have multiple cardiovascular difficulties operating, and as described previously, they do have an added effect on somebody's abilities and condition. ¶ With respect to the current question of Kite analysis, I would identify that for purposes of a Kite analysis, I am providing the opinions of the added effect once all the different conditions are seen and evaluated in my original report of September 2019. Whether or not they came from a specific injury or cumulative trauma injury, they now have all summated into an additive condition across his coronary artery disease, deep vein thrombosis, pulmonary embolization and hypertensive heart disease. If this requires that the specific and cumulative trauma injury be viewed as inextricably intertwined for the Kite analysis, this is a determination to the Trier of Fact that I would support.

(Court Exh. A, Dr. Hyman, March 15, 2021, pp. 2 – 3.)

The parties proceeded to trial on August 19, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 19, 2021.) The stipulations included, applicant “sustained injury arising out of and in the course of employment to his heart, cardiovascular system, and respiratory system” The issues submitted for decision included:, “Parts of body: Applicant claiming/ Defendant denying injury to the respiratory system on an industrial basis,” permanent disability, and whether based on the reporting of Dr. Hyman, the impairments should be added or combined. (MOH/SOE, p. 3.)²

DISCUSSION

We first note that in its Petition, and at various times during the proceedings of this matter, defendant has contended that based on the Appeals Board panel decision, *Devereaux v. State*

² The record contains no explanation as to why the parties stipulated that applicant sustained injury AOE/COE to his respiratory system and the issue of whether applicant sustained injury AOE/COE to his respiratory system was a disputed issue submitted for decision.

Compensation Insurance Fund (Devereaux) (2018) Cal. Wrk. Comp. P.D. LEXIS 592, “[T]he extent to which impairments affect applicant’s ability to perform activities of daily living is determinative with respect to an accurate rating, and whether they should be combined or added.” (Petition, p. 4; see also Court Exh. H, pp. 75 – 79 [EAMS pp. 8 – 12].) Defendant’s argument is incorrect. The *Devereaux* decision states:

We do not concur with defendant's contention that absent effective rebuttal evidence of a "synergistic effect" between the impairments, use of the CVC chart is mandated. Multiple cases have held that this determination is best based upon the extent to which the impairments affect applicant's ability to perform activities of daily living. It is the opinions of the medical evaluators and not a rigid application of the CVC in the rating schedule that should prevail. (*Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213, [appropriate to use additive approach because AMA Guides describe several methods of combining impairments and rigid application of CVC is not mandated].) (*Devereaux, supra* [at decision pp. 9 – 10].)

As quoted above, the panel in the *Devereaux* decision stated that the impairments effect on an injured worker’s activities of daily living is a factor to be considered but it did not state that it is “determinative with respect to an accurate rating.” Also, in the Petition defendant states that: “Injury to the respiratory system has simply not been alleged in the Application.¶ There has been no amendment to the pleadings and thus defendants contend there is no issue to resolve with respect to the respiratory system.” (Petition, p. 6.) However, as noted above, at the trial the parties stipulated that applicant sustained injury AOE/COE to his respiratory system and then the issue of injury AOE/COE to applicant’s respiratory system was submitted for decision. Defendant’s statement is clearly inconsistent with the trial record as described in the MOH/SOE. Counsel is reminded that misrepresenting the law or the facts of the matter at issue is inappropriate conduct.

Regarding the merits of the Petition:

A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (e.g. blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. (American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), p. 10.)

The Sixth District Court of Appeal explained that the AMA Guides provide guidelines for the exercise of professional skill and judgment which may result, in a given case, in ratings that depart from those found in the AMA Guides. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].) The Court explained that application of the AMA Guides must take into account the instructions on its use, which clearly prescribe the exercise of clinical judgment in the impairment evaluation, even beyond the descriptions, tables, and percentages provided for each of the listed conditions. (*Id* at 824.)

The AMA Guides describe several methods of combining impairments and rigid application of combined values chart (CVC) is not mandated and the disability values of multiple impairments may be added instead of combined using the CVC if that provides an accurate rating of the injured worker's disability. (*Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013 W/D) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34], see footnote 1 above; see also *Los Angeles County Metropolitan Transportation Authority v. Workers' Comp. Appeals Bd. (La Count)* (2015 W/D) 80 Cal.Comp.Cases 470 [2015 Cal. Wrk. Comp. LEXIS 47].)

An AME is presumably chosen by the parties because of his or her expertise and neutrality. Therefore, AME Dr. Hyman's opinions should be followed unless there is a good reason to find his opinions unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) In his reports and deposition testimony, Dr. Hyman repeatedly explained his opinion that applicant's heart is impacted with multiple conditions, and because of the severity of the conditions, his heart cannot properly compensate for any one of the conditions. Therefore, applicant's heart is materially worse than it would be with only one of these conditions and the impairments should be added as opposed to combined due to the additive effect that the conditions have on his heart.

[W]hen an individual has multiple parts of the cardiovascular system impacted from different processes, they cause each of the processes to struggle further than a standalone isolated condition. As an example, if the heart has to pump to overcome high blood pressure versus when the heart has to pump to overcome high blood pressure and ischemia, those are additive effects on the cardiovascular system. It is for these reasons as explored in all my past reporting why I identified his advanced condition as being considered additive in nature. (Court Exh. B, p. 2; see also as quoted above, Court Exh. E, p. 4; Court Exh. C, p. 2; and Court Exh. A, p. 3.)

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].) When a physician's report is well-reasoned, is based on an adequate history and examination, is not speculative, and it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions; the report constitutes substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

As discussed herein, Dr. Hyman examined applicant, took a history, and reviewed the extensive medical record. Thereafter, he repeatedly provided a detailed explanation as to his opinion that applicant's disability is more accurately identified by adding the multiple factors, as opposed to combining them. We see no basis for finding his opinions unpersuasive. Thus, his reports and deposition testimony constitute substantial evidence.

Finally, regarding defendant's argument that applicant did not sustain injury to his respiratory system, as noted by the WCJ in his Report:

The pre-trial conference statement of 06/08/2021 and the Minutes of Hearing from the 08/19/2021 trial proceeding both reflect injury to the respiratory system was admitted by petitioner. In addition, in the 02/12/2020 deposition [Court Exh. I, pp. 59 – 60] the AME acknowledges pneumonia as a presumptive injury for police officers (Labor Code Section 3212). ¶ Thus, the finding of injury to the respiratory system is supported by the stipulation of the parties and the statute. (Report, p. 4.)

There is no evidence in the trial record that is inconsistent with the WCJ's conclusion that applicant sustained an injury AOE/COE to his respiratory system.

Based on our review of the record, we agree with the WCJ that applicant sustained injury AOE/COE his heart, cardiovascular system, and respiratory system, that applicant's permanent disability is most accurately rated by adding the permanent disability factors rather than combining them, and that as a result of the injury applicant is permanently totally disability. Therefore, we will not disturb the F&A.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award and Order issued by the WCJ on November 1, 2021, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 6, 2022

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

**ISRAEL REYES
ADAMS, FERRONE & FERRONE
INGBER & WEINBERG**

TLH/pc

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