

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

**LO CHING ZIEGLER, *Applicant***

**vs.**

**CALPERS; STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ9866040 (MF), ADJ9866066, ADJ10402819  
Los Angeles District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**APRIL 5, 2022**

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

**LO CHING ZIEGLER  
GRAIWER & KAPLAN  
STATE COMPENSATION INSURANCE FUND**

**PAG/ara**

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**

Defendant, State of California, Cal PERS, by and through their administrator and attorneys of record, State Compensation Insurance Fund, have filed a timely, verified Petition for Reconsideration contending that this WCJ erred in finding that the Applicant sustained injury arising out of and in the course of employment to his bilateral knees on November 19, 2014 (ADJ10402819), in finding that the Applicant was entitled to a permanent disability award of 100%, erred by merging the Applicant's cases into one order and award, and erred in determining that the vocational report of Antonio Reyes was substantial medical evidence, and by not considering the vocational report of Robert Liebman to have adequately addressed the Applicant's fibromyalgia, in the Joint Findings, Award and Order issued on January 13, 2022, related to the above referenced matters.

**II**  
**FACTS**

The Applicant, born [], was employed as a Planning Specialist by Cal PERS in Glendale, California, and sustained admitted injuries to his neck, low back and right knee, and sustained fibromyalgia, hypertension and GERD/IBS, arising out of and in the course of his employment on February 18, 2015. He also sustained admitted injuries to his neck, low back, right wrist, right knee, and sustained fibromyalgia, hypertension and GERD/IBS, arising out of and the course of his employment during the period from February 19, 2014 through February 18, 2015. The Applicant claimed additional injuries associated with both the specific injury of February 18, 2015 and the cumulative trauma injury occurring during the period from February 18, 2014 through February 18, 2015, which included sleep disorder, chronic pain and injury to psyche. The Applicant also claimed an additional specific injury occurred on November 19, 2014, arising out of and in the course of employment and causing injury to both of his knees.

Evidence was presented and exhibits were admitted at trial on October 20, 2021, and the matter was submitted. Both parties submitted reports from vocational experts. On January 13, 2022, Joint Findings of Fact, Award and Order issued, in which it was found that the Applicant, had sustained industrial injury on November 19, 2014, to his left and right knee, although he did not have permanent disability as a result of this injury. It was determined that the Applicant was entitled to the statutory 104 weeks of temporary disability benefits, as he was not determined to have reached a permanent and stationary status until August 20, 2018. It was found that the Applicant was entitled to a Permanent Disability Award of 100% and a commutation was requested from the DWC, Disability Evaluation Unit, based on the finding that the Applicant was found to be permanently totally disabled as a result of cases ADJ9866040, the specific injury of 2/18/2015, and ADJ9866066, the cumulative trauma injury from 2/18/2014 through 2/18/2015, with payments commencing December 28, 2017, after completion of the temporary disability payments awarded, and with weekly payments to be reduced for payment of attorney's fees of \$200,400.68 to be paid

from the side of the award. It was found that the Applicant was in need of future medical treatment to cure or relieve the effects of the industrial injuries sustained. It is from this Joint Findings, Award and Order that petitioner seeks reconsideration.

### **III** **DISCUSSION**

#### **FINDING OF INJURY AOE/COE FOR ADJ10402819**

In his initial report of August 4, 2015, Agreed Medical Evaluator, Dr. Lawrence Feiwell, addresses the specific injury of November 19, 2014, involving the Applicant's right and left knee, noting that the Applicant fell in the parking lot and notified his employer of the injury but received no medical treatment. He notes that the Applicant continued working subsequent to this injury. As referenced in the report of Marc Nehorayan, M.D. dated December 28, 2017 (Exhibit 2, EAMS ID 38678301), he notes review of records that include Applicant's initial treatment report and Doctor's First Report of Injury of March 19, 2015, by Dr. Phillip Sobol which note a specific injury of November 19, 2014, due to a fall in the parking lot, for which no treatment was provided although the Applicant notified his employer of the injury. Dr. Sobol notes contusions to both knees. Dr. Sobol provided treatment for the Applicant's orthopedic injuries including the knees, which included medication. No rebuttal evidence or testimony of any witness was provided at trial to rebut that a fall occurred on November 19, 2014, causing injury to the Applicant's knees, or to indicate that the Applicant did not report the injury to his employer or request treatment, as is stated in the reports.

It was determined that the Statute of Limitations issue raised by the Defendant is tolled as the Defendant was aware of the injury on the day it occurred and did not provide either treatment or a claim form at the time of injury. As Dr. Sobol provided medications to treat the Applicant's injuries which included the knees and the AME, Dr. Feiwell confirms injury to the knees but notes no residual impairment, it was determined that the Applicant sustained injury to the knees arising out of and in the course of employment that did not result in permanent impairment, and that the Applicant was entitled to treatment for those injuries. Defendant's assertion that because they did not provide any treatment for the injuries to the knees, and the Applicant was not temporarily disabled due to the injuries, is not substantiated by the evidence presented.

#### **ASSESSMENT OF VOCATIONAL EXPERT REPORT OF ROBERT LIEBMAN**

Both parties submitted reports from vocational experts regarding the Applicant's ability to participate in retraining for reemployment and ability to compete in the open labor market. Defendant disputes the determination that the report of Dr. Reyes was better substantiated and more comprehensive, and dispute the decision to utilize the report of Dr. Reyes to determine that the Applicant was permanently totally disabled, and unable to compete in the open labor market.

The determinations of Dr. Anthony Reyes in his report of December 12, 2019 (Exhibit 1, EAMS IDS 37516963 and 37516964, uploaded in two parts due to its size) were confirmed by the QME, Dr. Stuart Silverman both in his initial report of August 20, 2018, when he opined that the Applicant was totally disabled not only from his pain, but by fatigue, cognitive problems, bowel

problems and sleep disturbance, and at his deposition on April 2, 2021, when he stated that he believed the Applicant was not employable and could not return to work in any capacity. Defendant argues that it was error not to determine that the reports of Defendant's vocational expert Robert Liebman were substantial medical evidence. The July 3, 2020 and January 29, 2021, reports of Robert Liebman, M.S., CRC, CCM, (Exhibits 00 and PP, EAMS IDS 36954207 and 36954208) were found to be credible and included rebuttal of the report of Dr. Reyes, but it was determined that the reports failed to adequately include the detrimental impact of the Applicant's fibromyalgia with regard to his ability to return to regular work. As explained by Dr. Silverman in his deposition of April 2, 2021 (Exhibit 107, EAMS ID 38678300), although the Applicant might be able to perform certain work duties for brief periods of time, those periods could be sporadic in nature, due to intervening fatigue and pain, causing the Applicant to be unable to work for certain periods of time, repeatedly.

Mr. Liebman discusses the Applicant's education level and work experience, which Defendant argues would provide opportunities for reemployment which were not considered by Dr. Reyes, as Dr. Reyes erred in his assessment of the Applicant's education and abilities. Ordinarily, the Applicant's level of experience and education would provide a basis for work opportunities, but the Applicant's resulting loss of cognitive ability, short term memory issues, fatigue and inability to focus due to pain, all of which occurred subsequent to the Applicant's education and work experience, severely limited the use of his pre-existing education and work skills. It was determined that these resulting impairments, considered more thoroughly by Dr. Reyes, render the Applicant unable to participate in regular work of any kind. The determination that the Applicant could not return work and could not compete in the open labor market was also stated by the Applicant's treating physician, Dr. Marc Nehorayan (Exhibit 2, EAMS ID 38678301), who indicated that based on the Applicant's orthopedic, psychiatric and rheumatologic compromise, the patient would not be able to return back to the open labor market, and recommended evaluation by a vocational specialist to confirm this determination.

Dr. Reyes did test the Applicant and found that the Applicant would be unsuccessful in occupations that require him to maintain a pace throughout the day. In reviewing the occupations in the market survey provided with Mr. Liebman's report, it was found that many involved independent contractor assignments, rather than true employment, and some were of a temporary duration, therefore these recommendations do not constitute regular work. Most required a certain minimum number of hours per week, with some scheduling flexibility, but none appeared to have the flexibility which would be needed by the Applicant if he were unable to work for multiple days due to pain and fatigue. This does not appear to have been considered by Mr. Liebman, but was interpreted from the testing of Dr. Reyes. For these reasons it was determined that, the report of Dr. Reyes was most accurate, and based on the assessment of Dr. Reyes, the Applicant was unable to return to work in the open labor market in any capacity due to his injuries and was therefore 100% permanently disabled.

**DETERMINATION THAT APPLICANT IS ENTITLED TO A PERMANENT DISABILITY AWARD OF 100% BASED ON ADJ9866040 and ADJ9866066**

In their Petition for Reconsideration, Defendant provides a combined rating for the two injury claims resulting in permanent impairment, but do not make an effort to rate each injury

individually. Likely this is due to the fact that certain component of the Applicant's compensable consequence injuries are unable to be rated separately. The DEU rating mentioned in the petition also does not address each injury with specificity for rating. Based on the medical evidence provided, the following individual ratings was considered for the underlying orthopedic injuries:

ADJ9866040 Specific Injury 2/18/2015

Cervical Spine

75% [15.01.02.02-16-[1.4]22-111C-16-19] 14.25

Lumbar

75% [15.03.01 .00 -13 -[1.4]18 -111 C -13 -16] 12

Rt. Knee

17.05.03.00 -2 -[1.4]3 -111 D -2 -3

ADJ9866066 Cumulative Trauma 2/18/2014 through 2/18/2015

Cervical

25% [15.01.02.02-16-[1.4]22-111C-16 -19) 4.75

Lumbar

25% [15.03.01 .00 -13-[1.4]18-111C-13-16] 4

Rt. Carpal Tunnel Syndrome (wrist and hand)

16.01 .02.02 -3 -[1.4]4 -111 G -5 -6

For the underlying orthopedic injuries, apportionment in line with *Benson v. Workers' Compensation Appeals Board*, 170 Cal. App 4th 1535, could be appropriate. However, as Defendant stipulated, the Applicant sustained further admitted injuries as a compensable consequence, simultaneously, for both the specific injury and the cumulative trauma injury, and the Applicant developed fibromyalgia as a result of the collective pain associated with the combination of the specific and cumulative trauma injuries as indicated in the cross-examination of Dr. Silverman, dated April 2, 2021. Dr. Silverman indicates that neither injury on its own would have likely been sufficient to manifest the resulting fibromyalgia, and it required the widespread pain associated with both injuries combined for the development of this component of the injuries. Apportionment to either injury was not possible, as the cause was necessarily inextricably intertwined.

In the *Benson* case, the court opined that when two industrial injuries both cause permanent disability, the permanent disability caused by each must be separately awarded, unless the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentage to which each distinct industrial injury causally contributed to the employee's overall permanent impairment. The Court in *Benson* recognized that a single permanent disability award may be appropriate if the physician cannot parcel out the percentage caused by each industrial injury to a reasonable medical probability. Labor Code §4664(a) indicates that an employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and in the course of employment, but in the instant case, both injuries arose out of and in the course of employment with the same employer, so liability will not change based on the apportionment. In *Benson*, the Court stated that in circumstances when the employer has failed to meet its burden of proof, a combined award of permanent disability may be justified.

Labor Code §5705 places the burden on the employer to show apportionment of permanent disability. In the case of *Gay v. Workers' Compensation Appeals Board (1979) 96 Cal. App 3d 555, 564, 44 Cal Comp Cases 817*, the court explained that in order to meet this burden, the employer "must demonstrate that based upon reasonable medical probability there is a legal basis for apportionment." They stated that apportionment is a factual matter for the Appeals Board to determine based upon "all the evidence." In the case of *Hikida v. Workers' Compensation Appeals Board (2017) 12 Cal. App. 5th 1249, 82 Cal. Comp. Cases 679*, the Court of Appeal held that an employee was entitled to a permanent disability award without apportionment where the disability was due entirely to a new condition, which developed from applicant's injuries and need for treatment. Dr. Silverman explained to a reasonable medical certainty that Applicant's fibromyalgia specifically developed as a result of both the specific injury and the cumulative trauma injury combined and are unable to be apportioned, but this extends to the associated digestive disorders, heart, cognitive impairment and neurologic impairment, all of which are new conditions which developed from Applicant's work related injuries, and developed as a result of both the specific injury and the cumulative trauma injury combined.

As indicated in Defendant's own rating, included in the Petition for Reconsideration, the two injuries are intertwined, as both are the cause of additional impairment to the Applicant's upper digestive tract, heart, colon, psyche, and caused cognitive and neurologic impairment. Additional permanent impairment was found based on these compensable consequence injuries. The ratings provided by the Defendant are accurate for the following:

Upper Digestive Tract

06.01.00.00-7-[1.4]10-111F -10-12

Colon Disorder

06.02.00.00 -7 -[1.4]10 -111 F -10 - 12

Cognitive Impairment

13.04.00.00 -11 -[1.4]15 -111 H -19 -23

Psyche

14.01 .00.00 -14-[1.4]20 -1111-27 - 32

However, the Defendant did not address the Applicant's fibromyalgia which was rated at 25% Permanent Impairment by the treating doctor, Dr. Salick in his report of 12/9/2015. There is also admitted injury of hypertension, which appears to be ratable at 10-15% permanent impairment, based on the Applicant's symptomology and using section 4.1, Table 4-2 of the AMA Guides, 5th Edition. Using a combined rating, as was Defendant's method in the Petition for Reconsideration, the following estimation of the rating was considered for comparison with the vocational and medical experts determinations regarding total disability in the determination of actual permanent impairment, compared with a rating using the AMA Guides and the Permanent Disability Rating Schedule with use of the Combined Values Chart:

Cervical Spine

15.01 .02.02 -16 -[1.4]22-111C-16 - 19

Lumbar

15.03.01 .00 -13 -[1.4]18 -111 C - 13 – 16

Rt. Knee

17.05.03.00 -2 -[1.4]3 -111 D -2 -3

Rt. Carpal Tunnel Syndrome (wrist and hand) '16.01.02.02-3-[1.4]4-111G-5 -6

Upper Digestive Tract

06.01 .00.00 -7 -[1.4]10 -111 F -10 -12 Colon Disorder

06.02.00.00-7-[1.4]10-111F-10-12 Cognitive Impairment

13.04.00.00 -11 -(1.4)15 -111 H -19 -23 Psyche

14.01 .00.00 -14-(1.4)20 -1111-27 -32 Fibromyalgia Neural Behavioral

13.06.00.00 -25 -[1.4]35 -1111 -44 -50

Hypertension

04.01 .00.00-10 -[1.4]14-111F -14 -17

(A)50 C32 C23 C19 C17 C16 C12 C12 C6 C3 = 90 PD

In considering the full extent of the rated permanent disability, and Applicant's loss of earning capacity, based on the medical evidence and the findings of vocational expert, Dr. Anthony Reyes, there is clear evidence substantiating a reasonable medical probability as well as a reasonable vocational probability, to indicate that the Applicant has suffered a greater loss of earning capacity than reflected in the formal rating, consistent with *Ogilvie III [Ogilvie v. Workers' Compensation Appeals Board (2011) 1987 Cal App 4th 1762, 76 Cal Comp Cases 624]*. It is for these reasons that the Applicant was found to be entitled to a permanent disability award of 100% for ADJ9866040, the specific injury of February 18, 2015, and ADJ9866066, the cumulative trauma injury of February 18, 2014 through February 18, 2015, combined.

#### **IV** **RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied for the reasons stated above.

Respectfully submitted,

**Lori Alison Holmes**  
Workers' Compensation Judge

Date: March 22, 2022