

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

LUIS GARCIA (deceased) / MARLENE GARCIA, *Applicant*

vs.

**LOS ANGELES COUNTY PROBATION DEPARTMENT permissibly self-insured,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES INC., *Defendants***

**Adjudication Number: ADJ3482353 (LAO 0887198)
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

By the Petition for Reconsideration (Petition) Marlene Garcia (applicant) seeks reconsideration of the Opinion and Decision After Reconsideration issued by the Appeals Board on March 2, 2022, wherein we determined in pertinent part that Luis Garcia's condition became permanent and stationary as of September 10, 2012; and that by adding the disability caused by the hypertensive cardiovascular disease to the disability caused by the upper urinary tract condition, and then combining that disability with the psychiatric disability, the injury caused 95% permanent disability.

Applicant contends that Mr. Garcia's internal disability and psychiatric disability should have been added, not combined; and that the permanent disability indemnity should have been awarded as of October 7, 2010, the date Mr. Garcia's psychiatric condition had become permanent and stationary.

We received an Answer from defendant. We note that in the Answer defendant argues that the proper permanent and stationary date is September 20, 2017, and that none of the factors of disability should have been added, instead all of the factors of disability should have been combined. It appears that by its Answer defendant actually seeks relief that would be properly sought by a Petition for Reconsideration, not an Answer. If considered as a Petition for Reconsideration, the Answer would be dismissed as not timely filed. (See Lab. Code, § 5903 and Cal. Code Regs., tit. 8, § 10605.) Therefore, the relief sought by defendant will not be considered in reaching the opinions and conclusions discussed herein.

We have considered the allegations in the Petition and the Answer. Based on our review of the record, for the reasons stated in our March 2, 2022 Opinion and Decision After Reconsideration, (Opinion) which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Luis Garcia claimed injury to his head, psyche, internal organs, and cardiovascular system, and in the form of a stroke, hypertension, renal disease, and diabetes while employed by defendant as a Deputy Probation Officer II, during the period from December 15, 2006, through December 15, 2007. Mr. Garcia was discharged from his employment as of January 4, 2008 (Def. Exh. A, EAMS pp. 4 – 6; Def. Exh. B, EAMS pp. 9 - 12.) Mr. Garcia passed away on January 17, 2019.¹

DISCUSSION

Regarding the issue of whether Mr. Garcia’s internal disability and psychiatric disability should have been added, not combined, as we explained in our Opinion, during his deposition AME Dr. Hirsch repeatedly stated there was no overlap in the impairment caused by Mr. Garcia’s renal insufficiency condition and his hypertension condition. However, it appears that applicant’s argument is based on the following portion of Dr. Hirsch’s deposition testimony:

Q Similarly, medically, do you see any overlap between the hypertension condition and the renal insufficiency condition and the psychiatric condition?

A No, I don't.

Q And, again, medically, those would be appropriate to be added, but legally you will defer that to the trier of fact?

A Yes, sir.

(Joint Exh. 15, p. 13.)

Dr. Hirsch’s response to applicant’s counsel’s two questions does not constitute substantial evidence. Unlike his explanation as to why the impairment caused by Mr. Garcia’s renal insufficiency condition and his hypertension condition should be added, Dr. Hirsch gave no explanation for his statement that there was no overlap in the impairment caused by the hypertension condition and the renal insufficiency condition and the psychiatric condition. Dr. Hirsch did not discuss the nature or extent of Mr. Garcia’s psychiatric impairment nor its impact

¹ For further discussion of the factual background of this matter, see our prior Opinion, pages 2 – 4.

on his activities of daily living. Further, it is important to note that Dr. Hirsch is certified in internal medicine, and psychiatry is outside his field of practice. Also, as we noted in our Opinion:

The record does not contain psychiatric medical evidence that addresses the issue of combining vs. adding disability, so the psychiatric disability is being combined with the Hypertensive Cardiovascular Disease/Upper Urinary Tract disability after those are added.
(Opinion, p. 6, fn. 4.)

Dr. Hirsch's deposition testimony does not constitute substantial evidence in regard to Mr. Garcia's psychiatric impairment and/or disability, and the record contains no psychiatric medical evidence as to the issue of adding the psychiatric disability to the other factors. Based thereon, our decision to add the hypertensive cardiovascular disease disability with the upper urinary tract disability, and then combine that disability with the psychiatric disability was correct and will not be disturbed.

As to the arguments regarding the permanent and stationary date and when the payment of permanent disability benefits should commence, we first note that the trial record contains no evidence that temporary disability indemnity benefits were paid or if they were paid, at what date those payments ended. Therefore, permanent disability benefits are to be paid as of the date Mr. Garcia's condition became permanent and stationary. (*Gangwish v. Workers' Comp. Appeals Bd.*, (2001) 89 Cal. App. 4th 1284, 1294 [66 Cal.Comp.Cases 584, 591].)

Applicant asserts that Mr. Garcia's condition became permanent and stationary on June 22, 2009 (See App. Exh. 5, Barry A. Halote, Ph.D., June 22, 2009, p. 22)² or in the alternative that the permanent and stationary date is October 7, 2010. (Joint Exh. 10, Carl E. Marusak, M.D., October 7, 2010, p. 31.) The doctors' reports state Mr. Garcia's "psychological condition can be considered permanent and stationary at this time" (App. Exh. 5, p. 22) and that Mr. Garcia's "condition is Permanent and Stationary from a psychiatric perspective." (Joint Exh. 10, p. 31.) An injured worker's condition is deemed permanent and stationary when the level of impairment is stable and is unlikely to change with or without treatment for a reasonable period. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 1528 [71 Cal.Comp.Cases 139]; *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155 [16 Cal.Comp.Cases 264].) Applicant argues that, "There is no legal or logical reason to delay the payment of permanent disability until

² The report actually indicates that applicant's psychiatric disability condition was permanent and stationary as of April 30, 2009. (See App. Exh. 5, 22.)

‘all body parts’ are found permanent and stationary.” (Petition, p. 7.) However, applicant does not explain how or why if an injured worker has an injury to different body parts, the fact that the condition of one body part became permanent and stationary means the level of impairment caused by the injury is stable and is unlikely to change with or without treatment. For example, if an employee has an injury to his right shoulder and left knee, if the right shoulder condition is permanent and stationary but surgery is scheduled for the left knee, then the level of impairment caused by the injury clearly is not stable and unlikely to change. Simply stated, applicant’s argument is inconsistent with the definition of permanent and stationary status. (*California Ins. Guarantee Assn. v. Workers’ Comp. Appeals Bd., supra; Sweeney v. Industrial Acc. Com., supra.*)

Our determination that Mr. Garcia’s condition, caused by his industrial injury, became permanent and stationary as of September 10, 2012, was based on QME Dr. Marusak’s opinion that the psychiatric condition had become permanent and stationary on October 7, 2010, and AME Dr. Hirsch’s opinion that the renal insufficiency condition and the hypertension condition had reached permanent and stationary status as of September 10, 2012. Our March 2, 2022 Opinion is consistent with the case law cited above as applied to the facts of this case.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Appeals Board's March 2, 2022 Opinion and Decision After Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 20, 2022

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

**LUIS GARCIA
MOISES VAZQUEZ, ESQ.
ENGLAND PONTICELLO & ST. CLAIR**

TLH/pc

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

OPINION AND DECISION AFTER RECONSIDERATION

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

Marlene Garcia (applicant) seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on October 23, 2020, wherein the WCJ found in pertinent part that Luis Garcia sustained injury arising out of and occurring in the course of employment (AOE/COE) to his psyche, renal system, and in the form of chronic hypertension, and that the injury caused 73% permanent disability, entitling Mr. Garcia to be paid permanent disability indemnity for the period from September 17, 2017, through January 17, 2019.

Applicant contends that Mr. Garcia's condition became permanent and stationary on June 22, 2009, that the factors of disability caused by the injury should be added not combined, that if the opinions of internal medicine agreed medical examiner (AME) Dr. Hirsch are not substantial evidence the record should be further developed, and that the Vocational Evaluation Report from Laura M. Wilson is substantial evidence that Mr. Garcia was 100% disabled as result of his injury.¹

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to find that Mr. Garcia's condition became permanent and stationary as of September 10, 2012, and that the injury caused 95% permanent disability (Finding of Fact 3); and to find that applicant's attorney has performed services with a reasonable value of \$13,300.00, (Finding of Fact 4); the Award will be amended based thereon.

BACKGROUND

Luis Garcia claimed injury to his head, psyche, internal organs, and cardiovascular system, and in the form of a stroke, hypertension, renal disease, and diabetes while employed by defendant as a Deputy Probation Officer II,

¹ In the Petition counsel refers to "the reports and testimony of the applicant's vocational expert, Laura Wilson." (Petition, p. 20.) The trial record contains one report from Ms. Wilson (App. Exh. 6) and there is no trial or deposition testimony by Ms. Wilson in the record. Counsel is reminded that misrepresenting the evidence in the trial record may, in the future, be deemed sanctionable conduct. (Cal. Code Regs., tit. 8, § 10421.)

during the period from December 15, 2006, through December 15, 2007. Mr. Garcia was discharged from his employment as of January 4, 2008 (Def. Exh. A, EAMS pp. 4 – 6; Def. Exh. B, EAMS pp. 9 - 12.) Mr. Garcia passed away on January 17, 2019.

Psychologist Barry A. Halote, Ph.D., submitted a permanent and stationary report wherein he stated:

Mr. Garcia appears to have reached maximal medical improvement and his psychological condition can be considered permanent and stationary at this time. He was considered temporarily totally disabled from May 2, 2008 and April 30, 2009.
(App. Exh. 5, Dr. Halote, June 22, 2009, p. 22.)

Psychiatric qualified medical examiner (QME) Carl E. Marusak, M.D., evaluated Mr. Garcia on October 7, 2010. (Joint Exh. 10, Dr. Marusak, October 7, 2010.) Dr. Marusak took a history, reviewed the medical record, and conducted various psychiatric diagnostic tests. He assigned a Global Assessment of Function (GAF) score of 66, concluded that Mr. Garcia's psychiatric condition was permanent and stationary, and stated "There is no temporary total psychiatric disability." (Joint Exh. 10, pp. 26, and 30 – 31.)

On September 10, 2012, Mr. Garcia was evaluated by AME Dr. Hirsch. (Joint Exh. 5, Dr. Hirsch, October 8, 2012.) After examining Mr. Garcia, taking a history, and reviewing the medical record, Dr. Hirsch stated:

Mr. Garcia is permanent and stationary for industrial disability rating purposes from an Internal Medicine standpoint. He has reached the point of maximal medical improvement. Based on the information available to me, Mr. Garcia did not require temporary total disability on an industrial basis due to problems in the arena of Internal Medicine.
(Joint Exh. 5, p. 18.)

Dr. Hirsch assigned 50% whole person impairment (WPI) to Mr. Garcia's hypertension/ stroke, and 30% WPI due to the renal insufficiency. (Joint Exh. 5, p. 19.)

QME Dr. Marusak re-evaluated Mr. Garcia on May 5, 2016. (Joint Exh. 9, Dr. Marusak, May 5, 2016.) Having reviewed the interim medical record and again conducting the psychiatric tests, Dr. Marusak assigned a GAF score of 49 and he restated his earlier conclusion that Mr. Garcia's psychiatric condition was the permanent and stationary as of October 7, 2010. (Joint Exh. 9, pp. 42 and 48.) Dr. Marusak also stated that Mr. Garcia, "... likely lacks physical and emotional capacity to work." (Joint Exh. 9, p. 48.)

AME Dr. Hirsch re-evaluated Mr. Garcia on August 22, 2017, (Joint Exh. 4, Dr. Hirsch, September 20, 2017.) Based on his re-examination of applicant and his review of the interim medical record, Dr. Hirsch again found Mr. Garcia's condition to be permanent and stationary; he assigned 50% WPI to Mr. Garcia's hypertension/stroke and 60% WPI to end-stage renal disease. (Joint Exh. 4, pp. 10 - 11.)

Dr. Hirsch was provided additional medical records and medical research literature to review. In his supplemental report Dr. Hirsch stated that his review of the records and the research did not change his previously stated opinions. (Joint Exh. 1, Dr. Hirsch, April 6, 2018, pp. 4 and 6.)

The parties proceeded to trial on September 12, 2019. The issues submitted for decision included injury AOE/COE, parts of body injured, the permanent and stationary date, permanent disability/apportionment, and the Labor Code section 3208.3(h) good faith personnel action defense. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 12, 2019, p. 3.)²

On November 4, 2019, the Order of Admission was vacated for further development of the record. The parties were instructed to, "... obtain clarification from Dr. Hirsch in regard to apportionment." (MOH/SOE, February 19, 2020, p. 2.) Dr. Hirsch was deposed on December 10, 2019. (Joint Exh. 15, Dr. Hirsch, December 10, 2019, deposition transcript.) His testimony included the following:

Q. In this case, do you see any overlap between his renal insufficiency condition and his hypertension condition?
or caused symptoms in Mr. Garcia, so I don't see any clinical or medical overlap between those two conditions. ...

Q. I'm talking about ... the impairment, the resultant impairment. You indicated that there is medically no overlap, which to me means that they have a different effect on the activities of daily living.

A. That's correct.

(Joint Exh. 15, p. 11.)

A. ... I will say I do not see any overlap between the manner by which -- when Mr. Garcia was alive, the manner by which hypertension was affecting him, causing symptoms, causing impairment in performance of activities of daily living and the way that end-stage renal disease was doing that. No overlap. (Joint Exh. 15, p. 12.)

² We note that Mr. Garcia passed away on January 17, 2019 and the issues submitted for decision pertained to the issue of accrued benefits.

Q Similarly, medically, do you see any overlap between the hypertension condition and the renal insufficiency condition and the psychiatric condition?

A No, I don't.

Q And, again, medically, those would be appropriate to be added, but legally you will defer that to the trier of fact?

A Yes, sir.

(Joint Exh. 15, p. 13.)

On February 19, 2020, the parties again proceeded to trial. The transcript of Dr. Hirsch's December 10, 2019, deposition was admitted into evidence and the matter was submitted. (MOH/SOE, February 19, 2020, p. 2.)

DISCUSSION

On October 7, 2010, QME Dr. Marusak said Mr. Garcia's psychiatric condition was permanent and stationary. (Joint Exh. 10, p. 31.) In his May 5, 2016 report Dr. Marusak again said Mr. Garcia's psychiatric condition was permanent and stationary as of October 7, 2010. (Joint Exh. 9, p. 48.) On September 10, 2012, AME Dr. Hirsch stated that Mr. Garcia had reached maximum medical improvement/permanent and stationary status "from an Internal Medicine standpoint." (Joint Exh. 5, p. 18.) In his August 22, 2017 re-evaluation report Dr. Hirsch reiterated his earlier opinion regarding Mr. Garcia's maximum medical improvement/permanent and stationary status. He also stated that Mr. Garcia, "... did not require temporary total disability on an industrial basis due to problems in the arena of Internal Medicine." (Joint Exh. 4, p. 10.) The reports from Dr. Marusak and Dr. Hirsch are substantial evidence that Mr. Garcia's condition was permanent and stationary as of September 10, 2012.

Regarding the issue of whether Mr. Garcia's factors of permanent disability should be combined per the Combined Values Chart (CVC) or should be added, we note that the Appeals Board has addressed this issue in several panel decisions. For example, the Appeals Board affirmed a WCJ's decision that if adding the disability factors provides a more accurate rating of the injured worker's disability, it is appropriate to use additive approach because AMA Guides describe several methods of combining impairments and rigid application of CVC is not mandated. (*Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ den.)) Also, it has been held that it was appropriate to add impairments rather than use the CVC based on an AME's opinion that there was synergistic effect as to the injured worker's orthopedic injuries so they should be added rather than combined. (*Los Angeles County Metropolitan Transportation Authority v. Workers' Comp. Appeals Bd. (La Count)* (2015) 80 Cal.Comp.Cases 470 [2015 Cal. Wrk. Comp. LEXIS 47] (writ den.)) It is also important to note that although the phrase "synergistic effect" was used in various decisions, the existence of a "synergistic effect" is not a prerequisite to

using the additive rating method, provided that substantial medical evidence supports a physician's opinion that adding the employee's impairments will result in a more accurate rating of the employee's disability than use of the CVC. (*University of California, Berkeley v. Workers' Compensation Appeals Board, (Sedlack)* (2020) 85 Cal. Comp. Cases 311 [2020 Cal. Wrk. Comp. LEXIS 17] (writ den.), *De La Cerda v. Martin Selko & Co.* (November 21, 2017, ADJ2970937) 2017 Cal. Wrk. Comp. P.D. LEXIS 533, (panel decision); *Barry v. Dept. of Food & Agric.* (May 10, 2019, ADJ9525033) 2019 Cal. Wrk. Comp. P.D. LEXIS 165 (panel decision); *Casias v. KF Howell Electric, Inc.* (May 20, 2019, ADJ7623043) 2019 Cal. Wrk. Comp. P.D. LEXIS 181 (panel decision).)³ A factor to be considered in determining the disability of different body parts should be combined or added is whether there is overlap of the impairments. (*Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595]; *Diaz v. State of California, Dept. of Corrections and Rehabilitation* (November 18, 2015, ADJ7682048) [2015 Cal. Wrk. Comp. P.D. LEXIS 683] (panel decision).)

At his deposition Dr. Hirsch repeatedly stated that there was no overlap in the impairment caused by Mr. Garcia's renal insufficiency condition and his hypertension condition;

I do not see any overlap in the way those two disorders affected Mr. Garcia or caused symptoms in Mr. Garcia, so I don't see any clinical or medical overlap between those two conditions.

(Joint Exh. 15, p. 11.)

I will say I do not see any overlap between the manner by which -- when Mr. Garcia was alive, the manner by which hypertension was affecting him, causing symptoms, causing impairment in performance of activities of daily living and the way that end-stage renal disease was doing that. No overlap.

(Joint Exh. 15, p. 12; see also p. 13.)

As an AME, Dr. Hirsch was presumably chosen by the parties because of his expertise and neutrality. Therefore, his 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].) There is no evidence in the record that contradicts or otherwise disputes Dr. Hirsch's opinions. We see no basis for finding his opinions unpersuasive and

³ Although panel decisions of the Appeals Board are not binding precedent and have no stare decisis effect, they are citable to the extent they point out the contemporaneous interpretation and application of the workers' compensation laws by the Board. (*Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145]; (*Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 [Appeals Board en banc].)

in turn, his opinions constitute substantial evidence.⁴ Based thereon, applicant's disability is rated as follows:

Hypertensive Cardiovascular Disease:
60% (04.01.00.00 - 50 - [5]64 - 390H - 69 - 76) 46%
Upper Urinary Tract:
60% (07.01.00.00 - 60 - [2]69 - 390G - 71 - 77) 46%
Psyche GAF: 49 = 32 WP
55% (14.01.00.00 - 32 - [8]45 - 390H - 51 - 59) 32%
46 + 46 = 92 C 32 = 95% PD

Accordingly, we affirm the F&A except that we amend the F&A to find that Mr. Garcia's condition became permanent and stationary as of September 10, 2012, and that the injury caused 95% permanent disability; and to find that applicant's attorney has performed services with a reasonable value of \$13,300.00; the Award is amended based thereon.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 23, 2020 Findings and Award is AFFIRMED, except that it is AMENDED as follows:

FINDINGS OF FACT

* * *

3. Mr. Garcia's condition became permanent and stationary as of September 10, 2012; the injury caused 95% permanent disability, entitling applicant to be paid permanent disability indemnity for the period from September 10, 2012, through January 17, 2019, or 330 weeks and 4 days, payable at the rate of \$270.00 per week in the total of \$89,207.75.

4. Applicant's attorney, Moises Vasquez, has performed services with a reasonable value of \$13,300.00 to date herein.

* * *

AWARD

* * *

a. Mr. Garcia's injury caused permanent disability of 95% entitling applicant to be paid permanent disability indemnity for the period from September 10, 2012, through January 17, 2019, or 330 weeks and 4 days, payable at the rate of \$270.00 per week in the total of \$89,207.75.

⁴ The record does not contain psychiatric medical evidence that addresses the issue of combining vs. adding disability, so the psychiatric disability is being combined with the Hypertensive Cardiovascular Disease/Upper Urinary Tract disability after those are added.

b. Applicant's attorney, Moises Vasquez, is awarded approximately 15% of the total Permanent Disability award, in the amount of \$13,300.00.