WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT BERGMAN, *Applicant*

vs.

BARRETT BUSINESS SERVICES INC, permissibly self-insured, administered by CORVEL CORPORATION, *Defendants*

Adjudication Number: ADJ9384866
San Bernardino District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings, Award and Orders issued by the workers' compensation administrative law judge (WCJ) on April 29, 2022, wherein the WCJ found in pertinent part that applicant's February 11, 2014 injury caused 73% permanent partial disability.

Defendant contends that the reports from psychiatric qualified medical examiner Linslee Egan, M.D., are substantial evidence regarding apportionment; and that if the reports are not substantial evidence, then the record should be further developed.

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 stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Award and Orders issued by the WCJ on April 29, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 22, 2022

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

ROBERT BERGMAN
LAW OFFICE OF ERIC GRITZ
LAW OFFICE OF DIXON, COOPER & BROWN

TLH/*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

By timely, verified Petition for Reconsideration, filed 5/23/2022, Petitioner, Barrett Business Services, Inc., Permissibly Self-Insured, administered by Corvel Corp., (hereafter defendant), by and through their attorney of record, Stephen W. Cooper, Esq. of the Law Offices of Cooper Brown, APC, seeks reconsideration of the Findings, Award and Orders issued herein on 4/29/2022.

Respondent, Robert Bergman (hereafter applicant), by and through his attorney of record Eric S. Gritz, Esq. of the Law Office of Eric Gritz, filed a timely and verified Answer to the Petition for Reconsideration on 5/31/2022.

ISSUES PRESENTED

1.
Was it error to consider the PQME's opinion on apportionment to be invalid?

INTRODUCTION

On February 11, 2014, while working as a tractor diesel mechanic, applicant sustained an injury arising out of and in the course of employment to his back, right lower extremity (resulting in amputation), his left ankle, his left knee, and to his psyche.

In the decision complained of, pertaining to the issues raised on reconsideration, the undersigned Workers' Compensation Administrative Law Judge found as follows:

"In regard to the applicant's injury to the psyche, I find that I must concur with the defense position that the final reporting of Dr. Blount does not carry the persuasive weight as do the final opinions of the Panel QME, Dr. Egan, as to the applicant's GAF score and whole person impairment, but I agree with applicant that Dr. Egan's opinion on the issue of apportionment to pre-existing factors is not substantial. To be valid apportionment, the doctor must explain the nature of the disease process or condition to which apportionment is applied, must explain how and why it is causing permanent disability at the time of the evaluation, and must explain how and why it is responsible for the percentage of disability to which apportionment is applied. Dr. Egan does not do this. In fact, upon cross-examination at deposition, Dr. Egan invalidated the prior opinion on apportionment by stating, "…in my medical opinion, this Applicant likely would not have had a psychiatric condition that would have happened if that accident had not occurred." {Reference, Exhibit B, Page 58, Lines 6 – 9. On that basis, I find applicant has sustained a psychiatric injury leaving applicant

with a GAF score of 51, which equates to 29% whole person impairment, and that impairment is not subject to any deduction for apportionment."

DISCUSSION

The WCAB en banc decision in *Escobedo v. Marshalls and CNA Insurance Co.* (issued April 19, 2005), 70 CCC 604, has provided guidance in how to address issues related to apportionment under Labor Code Sections 4663 and 4664. After reviewing the facts of that case and the relevant statutory and case law, the Board held that:

1) Section 4663(a)'s statement that the apportionment of permanent disability shall be based on "causation" refers to the causation of the permanent disability, not causation of the injury, and the analysis of the causal factors of permanent disability for purposes of apportionment may be different from the analysis of the causal factors of the injury itself.

2.) Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting physician and the WCAB must make determinations of what percentage of the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.

3.) Under Section 4663, the applicant has the burden of establishing the percentage of permanent disability directly caused by the industrial injury, and the defendant has the burden of establishing the percentage of disability caused by other factors.

4.) Apportionment of permanent disability caused by "other factors both before and subsequent to the industrial injury, including prior industrial injuries," may include not only disability that could have been apportioned prior to SB 899, but it also may include disability that formerly could not have been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions), ***provided there is substantial medical evidence establishing that these other factors have caused permanent disability.***

5.) Even where a medical report "addresses" the issue of causation of the permanent disability and makes an "apportionment determination" by finding the approximate relative percentages of industrial and non-industrial causation under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence.

The holding in *Escobedo* has been further defined by the court in *E. L. Yeager Construction v. WCAB* (2006) (*Gatten*) 71 CCC 1687. In *Gatten,* the court

reversed an unapportioned award due to an employee's underlying chronic degenerative disease of the lumbar spine. The court stated that under the new standards, evidence of prior disability or modified work performance were no longer a prerequisite to apportionment. The court stated, in *Gatten*:

> "We find nothing questionable about a medical expert's reliance on an accepted diagnostic tool. A medical expert may well view a person's history of minor back problems as being more significant in light of the evidence of substantial degeneration of the back shown on an MRI. Dr. Akmakjian did so here. His conclusion cannot be disregarded as being speculative when it was based on his expertise in evaluating the significance of these facts. This was a matter of scientific medical knowledge and the Board impermissibly substituted its judgment for that of the medical expert.
>
> "…The doctor made a determination based on his medical expertise of the approximate percentage of permanent disability caused by degenerative condition of applicant's back. Section 4663, subdivision (c), requires no more." (*Gatten*, Id. At 1692-1693.)

Gatten provides that a reasoned medical opinion, based on medical experience and diagnostic evidence, can support apportionment under Labor Code Section 4663, even where that opinion is couched in terms of an estimate. A physician's opinion on the issue of the extent to which previously non-symptomatic non-industrial factors caused applicant's permanent disability constitutes substantial medical evidence to justify apportionment. An opinion that applicant's current level of permanent disability was caused in part by a pre-existing pathological condition meets the requirements of *Escobedo*, as it is framed in terms of reasonable medical probability and is based on the relevant facts, a review of applicant's medical history, and a full medical examination, including a review of an accepted diagnostic tool.

That being said, just because a report addresses the issue of causation of the permanent disability and makes an apportionment determination by finding the approximate percentage of industrial and non-industrial causation does not necessarily render the report a reliable one for purposes of the appeals board's reliance upon it on the issue of apportionment. It is well established that decisions of the appeals board must be supported by substantial evidence and an opinion on apportionment may not be relied upon unless it constitutes substantial evidence. The *Escobedo* case also tells us that a medical opinion is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely conclusions.

Apportionment determinations require familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability and set forth the basis for the opinion, so that the appeals board can determine

whether the physician is properly apportioning under correct legal principles, requiring the opinion to be framed in terms of reasonable medical probability, requiring it not be speculative, requiring it to be based on pertinent facts and on adequate examination and history, and it must set forth reasoning in support of its conclusions.

The Appeals Board in *Escobedo* provided an example as to how a physician should go about making an apportionment determination: what is the nature of the condition to which the physician is apportioning a percentage of the disability; how and why was it causing permanent disability at the time of the permanent and stationary evaluation, how and why is it responsible for the percentage of the disability.

The physician no longer has to prove non-industrial pathology caused disability prior to the industrial injury or that the pathology alone would have caused a particular amount of permanent disability absent the industrial injury, but the physician must explain the "how and why" the nonindustrial condition caused the present disability. Apportionment may be denied if the doctor fails to explain or support the conclusion on apportionment [*Sharp Grossmont Hospital v. WCAB* (*Powell*) (2005) 71 CCC 85 (writ denied) and *Hosino v. Xanterra Parks and Resorts (Furnace Creek Inn*), (2017) Cal. Wrk. Comp. P.D. Lexis 341 – with this last case being a case in which the undersigned WCALJ's finding of valid apportionment by an AME was overturned by the Board].

In determining whether a physician's apportionment opinion was substantial evidence, the holding in *Kos v. WCAB* (2008) 73 CCC 529 (writ denied) indicated that the board may consider several factors including, but not limited to: (1) the severity of the pre-existing condition; (2) the mechanics of the injury – whether the trauma involved was minor or significant; (3) the nature and extent of any pre-injury symptoms or treatment; and (4) the nature and extent of any pre-injury work restrictions or lost work time.

In the holding in *United Airlines v. WCAB (Milivojevich*) (2007) 72 CCC 1415 (writ denied), the appeals board held that the employer failed to meet its burden on the issue of apportionment when the AME apportioned to the applicant's risk factors for injury rather than to causation of disability, when the opinion was not framed in terms of reasonable probability and that the doctor did not adequately explain the exact nature of the apportionable disability and how and why the disability was causally related to the industrial injury.

In the instant matter, it is important to realize that the applicant had a severe orthopedic injury resulting in the amputation of his right leg. Prior to that injury, applicant worked in a high-paying occupation that he loved. The parties stipulated to the permanent disability found by the orthopedic evaluator. The physician upon whose reporting the applicant's permanent psychiatric disability was determined, the Panel QME Dr. Egan, opined that 20% of applicant's

permanent psychiatric disability was the result of nonindustrial factors consisting of poor coping skills and nonindustrial stressors, which may be construed as risk factors for injury, but which were not adequately described as causative of disability. This opinion was not framed in terms of reasonable medical probability and did not explain adequately the "why and how" of apportionment. Further, in Dr. Egan's initial report of 6/21/2017, the doctor confirmed that "there is no relevant psychiatric history for the applicant" and opined that "there are no other known contributory nonindustrial stressors" (Exhibit A-1, Page 21).

Yet, in her discussion of apportionment, Dr. Egan opined that "20% of the applicant's psychiatric injury was the result of pre-existing poor coping skills and impaired distress tolerance combined with a nonindustrial stress burden, which predisposed him to psychiatric decompensation in the face of stress." Yet, she does not explain the how or why for this opinion in the face of applicant's traumatic leg amputation, nor does she explain the nature of these conditions and how or why they were causing disability at the time of the permanent and stationary evaluation nor did she explain the how or why they are responsible for the percentage of disability attributed to them.

Additionally, upon being deposed, when asked whether applicant had a pre-existing psychological disability, Dr. Egan responded, "not that was diagnosed. Well not to my knowledge, that was diagnosed by a medical doctor." (Exhibit B, Page 55, Lines 4 – 7). Dr. Egan also confirmed in her deposition that the nonindustrial factors of poor coping skills and nonindustrial stressors were risk factors (Exhibit B, Page 56, Lines 3 – 15). She finally stated that "in my medical opinion, this Applicant likely would not have had a psychiatric condition that would have happened if that accident had not occurred." (Exhibit B, Page 58, Lines 6 – 9.

While defendant asserts that the undersigned WCALJ should have exercised "his" [sic] discretion to develop the record if it was determined that the Panel QME's opinion on apportionment was deemed to be not-substantial. That might be the case if the doctor's deposition had not been taken and the apportionment determination had not challenged in that deposition – however, the deposition was taken and the apportionment determination was challenged very effectively. The record had been further developed on that issue. Further, the holding in *Lozano v WCAB* (2002) 67 CCC 970 (writ denied) further stated, "The WCAB does not have a duty to develop the record where a party who has the burden of proof recognizes the insufficiency of the record and does not take appropriate action."

In the instant case, the Panel QME's opinion on apportionment was determined not to be substantial after the successful and effective cross-examination at deposition, and while the doctor's opinions in all other respects were deemed to

be substantial, the doctor's opinion in regard to apportionment was deemed to not be substantial. It was not error to make such a determination.

RECOMMENDATION

I recommend the Petition for Reconsideration, filed by defendant on 5/23/2022 be ***DENIED*** on the merits.

Dated at San Bernardino, California
6/14/2022

MYRLE R. PETTY
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE