WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRAD SANDERS, *Applicant*

vs.

CHICO IMMEDIATE CARE;
EMPLOYERS COMPENSATION INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ8998294
Redding District Office

OPINION AND ORDER DENYING PETITION FOR REMOVAL, GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Chico Immediate Care, insured by Employers Compensation Insurance Company (defendant), seeks removal from the First Amended Findings and Award, Orders and Opinion on Decision (F&A), dated February 13, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a medical assistant on May 18, 2009, sustained industrial injury to the brain, spine, lungs, eye, ribs, GI issues, anxiety, and in the form of bladder issues. The WCJ found, in relevant part, that development of the record was necessary, and deferred a determination on the final levels of permanent disability pending additional medical-legal evaluations.

Defendant contends it is inappropriate to reopen the record because applicant made a tactical decision to move forward to trial on an incomplete record, and that there is no good cause for development of the record.

We have received an answer from applicant (Applicant's Answer). The WCJ has prepared a Report and Recommendation on Petition for Removal (Removal Report) recommending that we deny the petition.

We have also received a Petition for Reconsideration from applicant seeking reconsideration of the February 13, 2023 F&A, wherein the WCJ found, in pertinent part, that applicant's earnings capacity was $452.80 per week, and that applicant did not rebut the 2005

Permanent Disability Rating Schedule (PDRS). The WCJ further ordered development of the record with regard to the issue of permanent disability.

Applicant contends that he has sustained injury resulting in permanent mental incapacity as contemplated by Labor Code section 4662(a)(4), resulting in permanent and total disability, and that the WCJ should have relied on applicant's vocational expert in the determination of his wage capacity.[1] Applicant further asserts his earnings capacity significantly exceeded the wage capacity figures identified in the F&A, and that his wage calculations should be based on that of a statutory maximum wage earner.

We have received an Answer from defendant (Defendant's Answer). The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Reconsideration Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Removal, and the contents of the WCJ's Removal Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will deny the Petition for Removal.

We have further 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 discussed below, we will grant the Petition, rescind Findings of Fact Nos. 6 and 7, defer the issues of average weekly wages and whether applicant has rebutted the rating schedule, and return the matter to the trial level for further proceedings and decision by the WCJ.

BACKGROUND

Applicant sustained injury to the brain, spine, lungs, eye, ribs, and in the form of GI issues, anxiety, and bladder issues, while employed as a medical assistant by defendant Chico Immediate Care on May 18, 2009. Applicant was injured in a motor vehicle accident.

The parties have selected Claude Munday, Ph.D., to act as the AME in neuropsychology, Michael Kasman, M.D., as the AME in neurology, Samuel Sobol, M.D., as the AME in internal medicine, and David Schindler, M.D., as the AME in otolaryngology.

[1] All further statutory references are to the Labor Code unless otherwise stated.

On September 6, 2022, the parties proceeded to trial. Among the issues framed were earnings, with applicant claiming $958.01 per week based on earnings capacity, and the employer claiming $349.94 per week based on wages. (Minutes of Hearing and Summary of Evidence (Minutes), dated September 6, 2022, at 2:14.) The parties also submitted for decision, in relevant part, the issue of permanent disability. Applicant testified, as did his mother and father. Mr. Marc Owens, a physician assistant and co-worker of applicant, and Mr. Andre Cinco, the Quality Insurance Litigation Manager for Employers Compensation Insurance Company, also testified. (November 29, 2022 Minutes, at 2:16.)

On February 10, 2023, the WCJ issued the F&A, determining in relevant part that, "[a]s of 8/28/2009, the applicant's average weekly wage per week would have been 452.80, calculated via an earning capacity/LC section 4453(c) analysis, which would give a TTD rate of 301.87 per week, and a maximum PD rate for a 2009 date of injury of 270.00." (F&A, Findings of Fact No.6.) The WCJ further determined that applicant had not rebutted the rating schedule (Findings of Fact No.7), and that additional med-legal evaluations were necessary before a full rating on permanent disability could be made (Findings of Fact No. 8.) The WCJ deferred the issue of permanent disability pending further discovery. (F&A, Order No. 1.)

Defendant's Petition for Removal contends that the lack of permanent disability ratings in the reporting of AME Dr. Kasman was evident from his January 7, 2014 report, and that applicant failed to act with diligence in obtaining supplemental reporting addressing any alleged deficiencies. (Defendant's Petition, at 3:2.) Defendant contends that the "decision to require an additional med-legal exam seeks to relieve Applicant of the consequence of the poor decision." (*Id*., at 3:18.)

Applicant's Answer contends the WCJ's order for development of the record does not result in substantial prejudice or irreparable harm to defendant, or that reconsideration will not provide an adequate remedy. (Applicant's Answer, at 6:19.) Applicant characterizes the WCJ's action in developing the record as addressing an issue in contention for which the record offers no competent evidence.

The WCJ's Removal Report observes that the parties have stipulated there was an industrial injury to the spine, and to utilize Dr. Kazman as the AME to address related issues, including the existence of permanent disability to the lumbar spine. (Removal Report, at p. 3.) Further, the parties agreed that the issue of permanent disability to the spine was an issue to be decided at trial.

Accordingly, following a review of the record and a determination that no competent evidence adequately addressed the issue of orthopedic permanent disability, the WCJ appropriately ordered development of the record. (*Ibid.*) The WCJ observes:

> This is therefore not an issue of the "rescue" of the applicant from an erroneous tactical decision. It is instead an effort to create some substantial medical evidence that addresses whatever permanent disability might exist in the spine, which is an accepted body part, which the parties agreed would be addressed by Dr. Kasman, and which issue the Board was requested by both parties to determine via trial. (Removal Report, at p. 3.)

Accordingly, the WCJ recommends that we deny Defendant's Petition.

In addition to defendant's petition, applicant has also filed a Petition seeking Reconsideration of the F&A, averring the evidentiary record supports a finding of permanent and total disability pursuant to the presumption of section 4662(a)(4). Applicant contends that the reporting of Dr. Munday supports applicant's total disability, and that the rehabilitative and vocational evidence further support applicant's lack of future earnings capacity. (Applicant's Petition, at pp. 7-8.) Applicant submits that a finding of permanent mental incapacity does not inherently require a finding of insanity or imbecility, and that applicant's difficulties with activities of daily living are supportive of his assertion of severe cognitive impairment. (*Id*. at pp. 9-10.) Applicant further contends that the evidentiary record supports a finding of earnings capacity at the statutory maximum. Applicant's coursework at college and his on-the-job training at Chico Immediate Care illustrate applicant's capacity to complete the coursework and standardized testing necessary to become a licensed physician assistant, with earnings greater than the maximum statutory wage rates. (*Id*. at 18:9.)

Defendant's Answer cites to the writ-denied case of *Winningham v. Workers' Comp. Appeals Bd.* (2016) 81 Cal.Comp.Cases 828 [2016 Cal. Wrk. Comp. LEXIS 101] for the proposition that, "there must be a showing of significant overall mental incapacity to warrant application of the conclusive presumption as Labor Code § 4662 provided a presumption of permanent total disability for 'an injury to the brain resulting in incurable mental incapacity or insanity.'" (Defendant's Answer, at 4:12.) Here, applicant "has demonstrated higher cognitive functioning and…provided comprehensive answers to questions by AMEs who found an applicant who was generally communicative and able to describe his problems and daily activities," and thus the record does not support a conclusive determination of permanent mental incapacity under

section 4662(a)(4). With respect to applicant's assertions of earnings capacity in excess of his average weekly wages, defendant contends that applicant's assertion of potential earnings in excess of his actual wages does not meet the quantum of proof necessary such a finding. Citing to *Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901 [55 Cal.Comp.Cases 196], defendant avers that applicant has not met his burden of establishing through "specific demonstrable evidence," that he was "oriented toward a definite career goal in commerce and is capable of achieving that goal." (*Id*. at 910.)

The WCJ's Reconsideration Report notes that with respect to applicant's assertion of permanent and total disability, AME Dr. Munday has offered conflicting conclusions. While Dr. Munday opined that applicant was unemployable, an opinion shared by applicant's vocational rehabilitation expert, Dr. Munday also provided an impairment of significantly less than 100%, and that when the evidence is in conflict, the PDRS is presumptively correct. (Reconsideration Report, at p. 4.) Additionally, Dr. Munday acknowledges that applicant may benefit from vocational rehabilitation. The WCJ also observes that Dr. Munday's reporting does not address the fact that after the injury, applicant successfully attended a local junior college and achieved some academic success. (*Id*. at p. 6.) The WCJ observes that despite the award of "24/7" home healthcare, applicant "has never agreed to accept that level of care, he currently lives by himself, can legally drive, and in fact Dr. Munday himself felt that applicant could be capable of this exact living arrangement with the sort of medical support he is currently getting." (Reconsideration Report, at p. 7.) With respect to applicant's arguments regarding earnings capacity in excess of his average weekly wages, the WCJ observes that the path to becoming a licensed physicians' assistant would require a four year degree with a 3.0 GPA, passing the Graduate Record Examination, then applying to and be accepted into a 27-month physician assistant program, and finally, passing the Physician Assistant Board License Examination. (Reconsideration Report, at p. 10.) Following his review of the record, the WCJ concluded that although applicant was "clearly oriented toward a definite career goal," applicant had not established the "that applicant was capable of achieving that goal." (*Id*. at p. 11, citing *Rubalcava, supra,* 220 Cal.App.3d 901, 910.) The WCJ recommends the denial of applicant's petition.

DISCUSSION

We first address defendant's Petition for Removal, which contends the WCJ's order for development of the record violates defendant's due process rights, and that applicant was not diligent in seeking supplemental reporting from the AME when Dr. Kasman did not describe impairment ratings to the various orthopedic body parts. (Removal Petition, at 4:3.)

The WCJ's Removal Report responds to defendant's assertions as follows:

> In response, it should be kept in mind that the parties have stipulated that there was an industrial injury to the spine. The parties have agreed to use Dr. Kasman to address that spinal injury in the capacity of an agreed medical evaluator. The parties do not appear to dispute that Dr. Kasman did not provide a final opinion on whatever permanent disability might exist in the spine, if any at all.
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> Both parties agreed that the issue of permanent disability to the spine was an issue that the Board should determine after trial.
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> Further, it is noted that in light of all this agreement, there is no substantial medical evidence in the record that addresses the issue of permanent disability to the spine.
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> This is therefore not an issue of the "rescue" of the applicant from an erroneous tactical decision. It is instead an effort to create some substantial medical evidence that addresses whatever permanent disability might exist in the spine, which is an accepted body part, which the parties agreed would be addressed by Dr. Kasman, and which issue the Board was requested by both parties to determine via trial.
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> When this judge went to do just that, it was discovered that none of the AME's both parties agreed to use in this case had issued a final decision on the level of permanent disability, if any, arising out of the accepted spine injury. Under these circumstances, the appeals board may develop the record with new medical evidence if neither side has presented substantial evidence on which a decision could be based. *San Bernardino Community Hospital v. WCAB (McKernan)* (1999) 64 CCC 986. (Removal Report, at p. 3.)

The WCJ and the Appeals Board have a duty to further develop the record when there is insufficient evidence to adjudicate an issue. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261].) The WCAB has a constitutional mandate to ensure "substantial justice in

all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264].) Accordingly, the WCJ or the Board may not leave undeveloped matters within its acquired specialized knowledge (*Id*. at 404).

Here, we agree with the WCJ's analysis, noting that the parties have jointly agreed to an AME, and have further jointly agreed to submit the issue of permanent disability to that AME. Following a review of the evidence, the WCJ has determined that the record must be augmented to fully address the disputes the *parties have jointly placed in issue*, including the nature and extent of the claimed injuries. Pursuant to our holding in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), once the WCJ has established that, as a threshold matter, the specific medical opinions are deficient, for example, that they are inaccurate, inconsistent, or incomplete, the preferred procedure is to allow supplementation of the medical record by the physicians who have already provided reporting in the case. (*Id*. at 141.) We thus agree with the WCJ's conclusion that it was appropriate to develop the record following a determination that "*neither side* has presented substantial evidence on which a decision could be based." (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].) Accordingly, we discern no irreparable harm or significant prejudice in the WCJ's order for further discovery, and will deny the Removal Petition, accordingly.

Turning to applicant's Petition for Reconsideration, we first address applicant's contention that the evidence supports a finding of permanent and total disability. Applicant contends that the presumption of section 4662(a) attaches, which provides for permanent disability which "shall be conclusively presumed to be total in character," for (1) the loss of both eyes or the sight thereof, (2) the loss of both hands or the use thereof, (3) an injury resulting in a practically total paralysis, or (4) an injury to the brain resulting in permanent mental incapacity. (Lab. Code, § 4662(a).)

Applicant cites at length to the reporting of AME Dr. Munday, who opines that "there is little question in my mind but that Mr. Sanders is totally disabled based solely on his overall mental status. From my perspective, he clearly qualifies under Labor Code 4662(d) which is a brain injury resulting in incurable mental incapacity."[2] (Ex. 2, report of Claude S. Munday, Ph.D., dated March 25, 2015, at p. 23.) Applicant asserts, however, that the WCJ applied an incorrect standard in his analysis of section 4662(a)(4), requiring that the evidence establish "insanity" or "imbecility" for

[2] Section 4662(d) was renumbered in 2014 as section 4662(a)(4).

the presumption of total disability to attach. (Applicant's Petition, at 8:24.)[3] Applicant contends that neither definition is controlling, and that insofar as the WCJ has determined that applicant does not meet these standards, "the WCJ cannot substitute his opinion on the issue of permanent mental incapacity in place of the AME." (Applicant's Petition, at 9:8.)

The WCJ's Reconsideration Report describes in detail the variety of factors that both support, and detract from, a determination that applicant is permanently mentally incapacitated:

> Petitioner argues that because Dr. Munday, the neuro-psyche AME (whose reports are in evidence as Joint Exhibits 5 through 8) felt that the industrial injury to the brain rendered him unemployable, and because this opinion was supported by the separate opinion of petitioner's VR expert (in evidence as Applicant's Exhibits 21 - 23), that his permanent disability was therefore total.
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> Although Dr. Munday does state that the applicant probably cannot find employment due to his brain injuries, he also provided a rating based on the rating schedule in place at the time of the evaluation, noting a whole person impairment from the brain injury of 51 %, which is clearly something less than total disability (see page 24, Joint Exhibit 8).
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> Therefore, Dr. Munday in fact said two separate and incompatible things about the applicant's level of permanent disability.
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> It must be kept in mind that in the case of a conflict of opinion on permanent disability such as is demonstrated here, the rating schedule is presumed to be accurate on the question of the level of permanent disability LC section 4660(c); *Contra Costa County v. WCAB (Dahl)*(2015) 80 CCC 1119.
>
> The schedule can be rebutted, and for this date of injury the Board in *Ogilvie v. WCAB* (2011) 76 CCC 624 described three ways that can be done. Of those three ways, only one applies to this case. Specifically, it must be shown that the employee is not amenable to rehabilitation due to the industrial injury, and therefore has suffered a greater loss of future earning capacity than is reflected in the schedule. The answer to that question normally requires the opinion of a vocational expert, as doctors are medical, but not vocational, experts. Here, there is no evidence in any of Dr. Munday's reports that either set of VR reports were ever presented to Dr. Munday to consider. From that point, the question then becomes whether Dr. Munday's purely medical opinion is substantial evidence

[3] In 2007, the legislature amended former section 4662(d), now section 4662(a)(4), to replace the term "imbecility" with the term "mental incapacity." However, in doing so, the 2007 amendments further noted, "[i]t is the intent of the Legislature, in enacting this act, not to adversely affect decisional case law that has previously interpreted, or used, the term "idiot," "imbecility," or "lunatic," or any variation thereof." (Assem. Bill No. 1640 (2007-2008 Reg. Sess.) § 5.) Accordingly, we discuss the statute's prior terminology only insofar as is relevant and necessary to the issue of California jurisprudence on the issue of the presumption of permanent and total disability arising out of mental incapacity.

to support an award of total permanent disability, as opposed to using the preferred rating schedule.

* * * * *

In addition, Dr. Munday did not address the fact that after the injury, the applicant took classes at the local junior college, and received a grade of A in Biology. The applicant thought so much of this accomplishment that he emphasized it in his Petition for Reconsideration as evidence that his future earning capacity should be considered in determining the correct average weekly wage (see pages 12, 13, and 17).

Nor did the doctor address the fact that applicant was able to complete multiple tests in his evaluation of3/25/2015, pages 13 - 16, Joint Exhibit 8, or the significance of the results of that testing, which, with the exception of the two memory tests, showed the applicant performing at a below to above average range. In his report of 3/22/2017 (Joint Exhibit 6), Dr. Munday advised the parties that with some simple accommodation, the applicant was able to participate in his deposition, and indeed no party questioned his ability to testify at deposition or at trial. In his report of 2/21/2017, Dr. Munday expressed the opinion that the applicant could be transitioned to independent living with medical backup. All of this is inconsistent with an inability to benefit from vocational rehabilitation.

Next, we can immediately see that the two sets of reports from the vocational rehabilitation experts are wholly insufficient to serve as substantial evidence for the question of whether the applicant is totally permanently disabled (Applicant's Exhibits 21 through 23, and Defendant's Exhibit F).

Both reports dealt almost exclusively with the question of whether the applicant's earning capacity should be legitimately considered in determining the proper average weekly earnings. The defendant's expert made zero effort to address the question of whether the applicant could benefit from vocational rehabilitation, and applicant's expert spent a total of three sentences on the subject (Applicant's Exhibit 23, page 2). Specifically, that expert said the following: "Due to the severity of Mr. Sanders' medical condition and deficits following the injuries he sustained on 5/18/09, he will require 24/7 care throughout his lifetime. This level of dependence on others for activities of daily living is inconsistent with the ability to obtain and maintain any form of competitive employment. As a result, Mr. Sanders has no fi1ture earning capacity."

These are conclusions, based on an incorrect history, and unsupported by any vocational analysis or testing. This conclusion does not address contrary evidence, such as the applicant's post injury educational success he mentions in his Petition for Reconsideration. Further, although the applicant has been awarded 24/7 care, he has never agreed to accept that level of care, he currently lives by himself, can legally drive, and in fact Dr. Munday himself felt that the

> applicant could be capable of this exact living arrangement with the sort of medical support he is currently getting. The applicant's vocational expert makes zero attempt to address this contrary and undisputed evidence. Thus, this opinion is based on an incorrect history, no vocational testing, evaluation, or analysis whatsoever, which leads to a fully conjectural conclusion. This is not by any measure substantial evidence of the applicant's ability to benefit from vocational services. (Reconsideration Report, at pp. 3-8.)

The WCJ further explains that while the legislature chose in 2007 to replace the statutory references to outdated and demeaning terms including "imbecility" and "insanity," the "gravity of the incapacity required to invoke the presumption," remains high. (Reconsideration Report, at p. 9.) The Reconsideration Report observes that applicant's post-injury educational pursuits, maintenance of a valid driver's license, ability to live by himself with support, and to participate in these proceedings, speak to a level of disability that does not rise to that contemplated by section 4662(a)(4). (*Ibid.*)

Following our review of the record, and pursuant to the WCJ's analysis, we are not persuaded that the record as it currently stands supports a finding of disability that is total in nature. (Lab. Code, § 4662(a)(4); see also *Fraser v. Geil Enterprises* (September 12, 2016, ADJ8918710) [2016 Cal. Wrk. Comp. P.D. LEXIS 454]; *Schroeder v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 506 [2013 Cal. Wrk. Comp. LEXIS 80].)

However, we also observe that the overarching goal of rating permanent impairment is to achieve accuracy. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal.App.4th 808, 822 [115 Cal. Rptr. 3d 112, 75 Cal.Comp.Cases 837].) A permanent disability finding must be supported by substantial medical evidence, which requires that "a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) We also observe that Dr. Munday has not yet benefitted from a review of the parties' respective vocational expert reporting, and that the vocational experts have not yet adequately addressed the issue of applicant's feasibility for vocational retraining.

Following his review of the evidentiary record, the WCJ has determined that development of the medical-legal record is necessary before a final decision on the issue of permanent disability may issue. (F&A, Findings of Fact No. 8.) Accordingly, we decline to disturb the WCJ's

determination with respect to development of the record. We note that pursuant to the order for development of the record, all parties retain the right to further discovery responsive to the issue of applicant's permanent disability levels.

However, we also note the WCJ's determination that applicant "has not rebutted the rating schedule." (F&A, Finding of Fact No. 7.) We observe that to the extent that the WCJ has deferred the entry of a final determination on the issue of permanent disability, the conclusion that applicant has not rebutted the rating schedule is premature. Until such time as the final rating pursuant to the PDRS has been identified, the issue of whether the rating schedule has been rebutted must be deferred. We will amend Finding of Fact No. 7 to defer the issue, accordingly.

Applicant also contends that his earnings capacity exceeds the WCJ's findings of a weekly earning capacity of $452.80. The WCJ relied on the calculations of vocational expert Blair Hunt to determine that although applicant was earning wages of $8.75 per hour at the time of injury, his earning capacity at his one year anniversary of employment would likely average to $11.32 per hour, or $452.80 per week. (F&A, Opinion on Decision, p. 7.)

Applicant contends that the WCJ's wage capacity analysis does not adequately consider applicant's earnings capacity assuming he followed a career path to becoming a physician assistant. Applicant contends that the evidentiary record provides "demonstrable evidence that applicant is oriented toward a definite career goal and that applicant is capable of achieving that goal." (Applicant's Petition, at 11:14, citing to *Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901 [269 Cal. Rptr. 656; 55 Cal.Comp.Cases 196] (*Rubalcava)*.)

In *Rubalcava*, a college student who sustained injury while working part-time in a pizzeria was entitled to a finding of maximum earning capacity based on specific demonstrable evidence that she was oriented toward a definite career goal and was capable of achieving that goal. (*Rubalcava, supra*, at 910.) Applying the standard described in *Rubalcava* to the present matter, applicant submits:

> While working full-time as a medical assistant, [applicant] was clearly oriented toward a definite career goal of becoming a physician assistant, or registered nurse as a backup plan. He had already accumulated more than 1,000 hours of clinic experience (a prerequisite for PA school) (TR 11/29/22, 25:12-22, 74:2-14), registered for Chemistry (a prerequisite for PA school) (TR 9/6/22, 58:8-15; 11/29/22, 71:1-7), obtained the support of his supervisors (three references are required for PA school) (TR 9/6/22, 101:19-25; 11/29/22, 76:22-25, 77:1-6), and developed and implemented a plan with the help of his mother, who was

> serving as his academic advisor, to fulfill all of his course requirements to obtain a four-year degree (a prerequisite for PA school) (TR 9/6/22, 43:24-25, 44:4-17, 134:3-13; 11/29/22, 51:18-24, 76:1-21). This included researching and gathering information on PA schools and their admission requirements. (Applicant and his mother maintained this information in a folder that was lost when their home was destroyed in the Camp Fire.) (Applicant's Petition, at 12:13.)

Additionally, applicant's co-worker Marc Owens testified to his familiarity with applicant, applicant's vocational skills, and to his opinion that applicant "if given time, would have moved on with his career to be a physician assistant." (*Id*. at 13:20.) Mr. Owens testified that applicant's work as a medical assistant was a "big step" toward becoming a physician assistant. (*Id*. at 13:26.) Applicant thus concludes that "the record in this case contains specific, demonstrable evidence that Applicant was oriented toward a definite career goal as a physician assistant (or registered nurse) and that he was capable of achieving that goal." (*Id*. at 17:22.)

The WCJ notes, however, that "evidence presented in support of this two pronged test must be substantial, and may not be speculative." (Reconsideration Report, at p. 9.) The WCJ explains:

> Here, the parties agree that the applicant had a poor academic career prior to the injury, with a low GPA, a tendency to start and then drop classes, and no completion of any STEM level courses.
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> However, the parties also agree that after working for 8 to 9 months at Chico Immediate Care, he believed that he had found his calling working as a medical assistant, and genuinely wanted to work towards the goal of becoming a physician's assistant. In support of that goal, the applicant produced evidence that his supervisors at the defendant would have provided a letter of recommendation if requested, and the applicant had also acquired considerable hours of clinical experience during his 9 months working at defendant's clinics. On the other side of the coin, to be successful in his goal of becoming a physician's assistant, the applicant would need to overcome significant academic and professional requirements, and be committed to this extended and demanding process for many years to come (Defendant's Exhibit F, pages 6-8).
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> Specifically, to attain his goal of becoming a physician's assistant the applicant would of necessity be required to obtain a four year degree with an emphasis in the sciences.
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> During that four years, it would be necessary to achieve a minimum of a 3.0 GPA in university level classes with an emphasis on the sciences.
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> Next, the applicant would need to pass the challenging GRE exam.

> Then, the applicant would need to apply and be accepted into a 27 month long physician assistant program. After passing that, the applicant would need to pass the PA Board License Exam.
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> The evidence shows this would require a time commitment from the applicant of about 7 years, assuming the successful and timely completion of each step.
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> Applying the two part test set out in *Rubalcava, supra*, this record establishes that the applicant was clearly oriented toward a definite career goal. However, the evidence does not establish that the applicant was capable of achieving that goal.
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> He was by all accounts not a successful student, displaying a tendency to sign up for very easy classes and then drop them. He had earned a poor GPA prior to the accident. He had only recently, during his 8 to 9 months working with defendant, decided that his career goal was to be a physician's assistant.
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> To achieve his goal to become a physician's assistant, he would have to overcome much more numerous academic and professional obstacles, and would have to maintain his commitment over an extended period of six or seven years, as cited above.
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> There is not much in applicant's history prior to the injury that would support the idea that he was capable of attaining this goal. The occasional academic success does not outweigh the balance of lackluster work. Enthusiasm he had, for now. A goal he had. However, the applicant's poor history of academic work, and history of lack of commitment and focus, does not establish that the demanding requirements of this goal could be met.
>
> Looked at another way, there is no way to know whether the applicant's new found enthusiasm for this career goal could be maintained over such a length of time, or whether his hitherto poor academic performance could be improved and then maintained to the standard necessary and for the time frame required.
>
> Balancing all this evidence leads to the conclusion that it is simply too speculative to find that the applicant was capable of achieving the goal he had only recently set for himself. The evidence does not meet the test set forth in LC section 4453(c) and *Rubalcava* to show by substantial and convincing evidence that he would be successful in his goal of becoming a physician's assistant but for the industrial injury. (Reconsideration Report, at pp. 10-11.)

In assessing whether an applicant's earning capacity exceeds average weekly wages at the time of injury, it is necessary to consider the likelihood of applicant achieving the earnings levels prognosticated at the time of trial. In *Brakensiek v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 96 [2004 Cal. Wrk. Comp. LEXIS 7] (writ denied), we held that it was

speculative to say that applicant would achieve her career goals of working in law enforcement when, despite being fully accredited, it had been two years since the date of injury and applicant had not received an offer of employment in the field of law enforcement. In *Peris v. Oakland Opera Theater* (February 26, 2014, ADJ6707712) [2014 Cal. Wrk. Comp. P.D. LEXIS 76], we affirmed the WCJ's determination that the evidence submitted by applicant of a self-directed skills development program was too speculative to support his claim of higher earning capacity. And in *Roach v. Royalty Ambulance* (December 18, 2020, ADJ9622991) [2020 Cal. Wrk. Comp. P.D. LEXIS 414], we affirmed the WCJ's determination that applicant, who had sustained injury while employed as an Emergency Medical Technician, had not sustained the burden of establishing that his earnings capacity was commensurate with his future plans to work at the sheriff's department or as a nurse in the fire department. We affirmed the WCJ's determination that the evidentiary record was insufficient to sustain a wage capacity analysis based on a vague reference to a possible plan to work at an unspecified position at the sheriff's department or as a nurse in the fire department. (*Id*. at 4.)

Here, we agree with the WCJ that although applicant had identified a definite career goal, the record did not establish through demonstrable evidence that applicant would achieve that specific goal. As the WCJ points out, the academic and professional requirements necessary to accreditation as a physician assistant were formidable, and the record did not establish that applicant would successfully complete the necessary requirements, including obtaining an undergraduate degree in the sciences, acceptance, enrollment, and completion of a 27 month academic program, successful completion of a Board examination, and subsequent employment as a physician assistant, all over a span of at least seven years. (Reconsideration Report, at pp. 10-11.)

However, the earnings capacity analysis is not limited to applicant's long-term career goals. Rather, the analysis should reflect applicant's "general over-all capability and productivity" as well as "the monetary effects of a disability on future earnings." (*Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889 [83 Cal. Rptr. 591; 35 Cal.Comp. Cases 27].) Factors to be considered in determining earning capacity are the employee's age and health, skill and education, and willingness and opportunities to work. (*Pascoe v. Workmen's Comp. Appeals Bd.* (1975) 46 Cal.App.3d 146, 153 [40 Cal.Comp.Cases 191] (*Pascoe*).) Enhancement of earning potential through completion of studies being pursued at the time of injury is a factor *which must be*

considered. (*Jeffares v. Workmen's Comp. App. Bd.* (1970) 6 Cal.App.3d 548, 552 [86 Cal.Rptr. 288; 35 Cal.Comp.Cases 201], *emphasis added*.)

Here, the vocational evidence considers applicant's earnings capacity primarily based on his educational levels and job description at the time of injury, but does not substantively explore applicant's earnings capacity based on the factors described in *Pascoe, supra*, including skill, completion of his education, and willingness and opportunity to work. (F&A, Opinion on Decision, p. 8; *Pascoe v. Workmen's Comp. Appeals Bd.*, *supra*, 46 Cal.App.3d 146, 153.)

An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall "…make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*).) Additionally, as we have noted above, the WCJ and the Appeals Board have a duty to further develop the record when there is insufficient evidence to adjudicate an issue. (*Tyler v. Workers' Comp. Appeals Bd., supra,* 56 Cal.App.4th 389, 393-395; *McClune v. Workers' Comp. Appeals Bd.*, *supra*, 62 Cal.App.4th 1117.) In accomplishing our constitutional mandate of ensuring substantial justice in all cases, we may not leave undeveloped matters within our acquired specialized knowledge. (*Kuykendall v. Workers' Comp. Appeals Bd., supra,* 79 Cal.App.4th 396, 404.)

The present record does not fully address applicant's earning capacity as reflected in applicant's "general over-all capability and productivity," or address applicant's "earning potential through the completion of studies being pursued at the time of injury." (*Goytia v. Workmen's Comp. Appeals Bd., supra,* 1 Cal.3d 889; *Jeffares v. Workmen's Comp. App. Bd., supra,* 6 Cal.App.3d 548, 552.) Accordingly, we will rescind Findings of Fact No. 6, which fixes applicant's average weekly wage, and defer the issue of applicant's earnings capacity pending augmentation of the record.

In summary, we do not find that the WCJ's order to develop the record with respect to issues that the parties have jointly submitted to an AME will result in irreparable harm or significant prejudice, and we deny defendant's Petition for Removal, accordingly. We also decline to disturb the WCJ's determination that the current record does not support a finding of presumptive total disability in accordance with section 4662(a)(4). While we agree with the WCJ's analysis that the record does not support a finding that applicant's earnings capacity was commensurate with that of a physician assistant, the record does not adequately address the full

spectrum of necessary factors of wage capacity, and we will amend Findings of Fact No. 6, to defer the issue of average weekly wages. Additionally, because the issue of permanent disability has been deferred, we will amend Finding of Fact No. 7 to defer the issue of whether applicant has rebutted the Permanent Disability Rating Schedule.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal, dated February 28, 2023, is **DENIED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration, dated February 27, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the First Amended Findings and Award, Orders and Opinion on Decision dated February 13, 2023, is **AFFIRMED,** except that it is **AMENDED** as follows:

FINDINGS OF FACT

6. The issues of applicant's average weekly wages and earning capacity are deferred.
7. The issue of whether applicant has successfully rebutted the Permanent Disability Ratings Schedule is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 28, 2023

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

BRAD SANDERS
LAW OFFICES OF LARRY S. BUCKLEY
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

SAR/abs

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