WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VENTURA OCHOA, *Applicant*

vs.

FOUNDATION CONSTRUCTORS, INC., and STARR INDEMNITY & LIABILITY COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ10464344
Oakland District Office

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.[1]

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 12, 2021, wherein the WCJ found in pertinent part that based on the physical demands of applicant's work, the appropriate group number (occupational variant) is 370 and that, applicant's October 27, 2015 injury caused 48% permanent disability.

Applicant contends that as a result of his left foot and low back injuries, he is not amenable to rehabilitation and he is permanently totally disabled; that the permanent disability rating schedule (PDRS) does not accurately describe applicant's permanent disability; that defendant did not meet its burden of proof on the issue of apportionment regarding applicant's low back disability; that defendant's exhibits C and D should not be admitted into evidence; and that based on the physical demands of applicant's work occupation group number 430 is the proper occupational variant.

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

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[1] As noted, we previously granted the Petition to allow further study of the factual and legal issues; Commissioner Sweeney and Deputy Commissioner Schmitz were members of the panel. Commissioner Sweeney no longer serves on the Appeals Board and Deputy Commissioner Schmitz is not presently available to review this matter; therefore, new panel members have been assigned in their place.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to find that the opinions of Richard F. Gravina, M.D., do not constitute substantial evidence regarding apportionment (Finding of Fact 2); to include a finding that the reports from Frank P. Diaz do not constitute substantial evidence that applicant is 100% disabled as a result of his injury (Finding of Fact 2); and to defer the issues of the proper occupational group number (Finding of Fact 1); the percentage of permanent disability caused by applicant's injury (Finding of Fact 2); and the amount of the fee to be awarded to applicant's counsel (Finding of Fact 4). Based thereon, we will amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his left foot, and to his low back as a compensable consequence of the left foot injury, on October 27, 2015, while employed by defendant as a welder/pile driver operator.

On February 7, 2017, neurology agreed medical examiner (AME) Richard F. Gravina, M.D., evaluated applicant. After examining applicant, taking a history, and reviewing the medical record, Dr. Gravina concluded that applicant's lumbar spine symptoms were secondary to the gait distortion caused by applicant's left foot injury, and that he had not reached maximum medical improvement/permanent and stationary status. (Joint Exh. 101, Dr. Gravina, February 15, 2017, pp. 10 and 13 [EAMS pp. 41 – 42].)[2]

Dr. Gravina re-evaluated applicant on October 16, 2017, and concluded that he remained temporarily totally disabled. (Joint Exh. 101, October 19, 2017, p. 30 [EAMS p. 31.) Dr. Gravina again re-evaluated applicant on June 19, 2018. Based on his re-examination of applicant and his review of the interim medical record, Dr. Gravina found that applicant's left foot and lumbar spine conditions were permanent and stationary. He stated that applicant's left foot condition resulted in 15% whole person impairment (WPI), and that applying the American Medical Association Guides to the Evaluation of Permanent Impairment, (AMA Guides) DRE (diagnosis-related estimate) Lumbar Category II, applicant had 8% lumbar spine WPI. (Joint Exh. 101, July 5, 2018, p. 16 [EAMS p. 59].) Dr. Gravina explained that if using the ROM (range of motion) method, the combined value of applicant's lumbar spine WPI would be 25%. He then stated: "[T]he range of

[2] Pages 11 and 12 are not included in the exhibit.

motion methodology provides a more accurate representation of impairment and therefore that methodology should be considered preferential for rating." (Joint Exh. 101, July 5, 2018, p. 17 [EAMS p. 60].) Regarding apportionment, Dr. Gravina stated: "Because the compensable lumbar injury occurred on a substrate of multi-level changes, the lumbar syndrome should be apportioned 80% to the industrial injury of October 25, 2015 and 20% to non-industrial degenerative changes." (Joint Exh. 101, July 5, 2018, p. 17 [EAMS p. 60].)

Dr. Gravina's deposition was taken on January 22, 2019. His testimony regarding apportionment included the following:

> Q. … The question is: But for this injury, but for the October 2015 incident, he would not require medical treatment to the low back, he would not have his ADLs impacted by his low back.
> A. That's somewhat speculative. Like we talked about before. The fellow is only, what, 40 -- maybe I don't understand your question. But I think at this point, this injury that we're talking about is entirely responsible for his back problem at this point, the injury. But the causation is apportioned. Is that clear or no?
>
> Q. … It's -- it's speculative to say that without this injury, the degenerative changes that we saw, the MRI on his low back would manifest in symptoms; is that correct?
> A. I think they are speculation. That's why I am having a hard time. I don't think the apportionment is speculation. Because you can see on the x-rays it occurred -- so he became symptomatic so shortly after the accident. I think the case went into trouble, you have a foot injury, sometimes two or three injuries or two or three surgeries and forth, the changes develop years later. Then I think at that point you can start nibbling away at it. I think it's there. It occurred within a month or so. This is not very hard medically. Administratively I'm not exactly sure. Medically it's not difficult.
>
> Q. Then I was just curious how you arrived at the 20 percent number.
> A. He has a lot of changes.
>
> Q. He has a lot of changes. 15 percent wouldn't be appropriate?
> A. Well, I think 20 percent because I thought that was at the time. I don't want to change it by modifier. I think that's appropriate. He has a bad spine for his age. I was quite surprised to see that his age, 43. That would indicate there is substantial anatomic abnormalities that predispose him to injury.
> (Joint Exh. 102, Dr. Gravina, January 22, 2019, deposition transcript, pp. 21 – 23.)

As to the issue of whether the factors of disability should be combined or added, Dr. Gravina's testimony included:

> Q. What I am trying to get to, not very elegantly, the Kite decision, if you are familiar with the Kite decision.
> A. I wouldn't -- I'll tell you why. I have already used a Guzman [analysis] to get a more appropriate rating. So I think that if you were to add them -- I think it will be overemphasizing his problem. Whereas I think if you don't use a Guzman you are underemphasizing his problem. ¶ I'm trying to get the most accurate representation of his problem. You can't get it with a straight rating. By adding it I think you are overemphasizing it. Joint 102
> (Joint Exh. 102, p. 14.)[3]

> Q. In other words, there would be -- there is -- there is some overlap of the functional loss between the two. At some point, some of the impairment is then duplicative between the low back and the foot?
> A. No. These are separate ratings. These are separate ratings. People by standard Guides, his low back is an 8 percent. That doesn't make sense to me, not with all the other stuff. ¶ If you go by the range of motion, it's 25 percent. You already bump that up, the range might be more commensurate with an accurate rating. If you add the 15 and the 25, I don't know what they are combined to, I think you are pushing it too far into a realm that is not appropriate. It's too high I think.
> (Joint Exh. 102, p. 15.)

Vocational rehabilitation consultant Frank P. Diaz evaluated applicant (via Skype) on July 30, 2019. After evaluating applicant, Mr. Diaz concluded:

> Based upon my extensive vocational analysis I am of the opinion that Mr. Ochoa has incurred a one hundred percent (100%) loss of labor market access (LeBoeuf). ¶ In regard to vocational apportionment, I am of the opinion that zero percent (0%) of Mr. Ochoa's loss of labor market is attributable to any pre-existing non-industrial or pre-existing industrial disabilities.
> (App. Exh. 1, Frank P. Diaz, October 14, 2019, p. 16, emphasis deleted.)

Applicant was evaluated by vocational rehabilitation consultant Howard Stauber on August 21, 2019. Mr. Stauber's conclusions included:

> The above noted [full-time work return] DFEC percentage, i.e., 57% represents, in my opinion, a presently viable depiction of Mr. Ochoa's Return to Work Alternatives; and Proposed Diminished Future Earnings Capacity, or work disability, due to industrial injury. Given this determination, and consistent with

[3] The doctor's reference to "Guzman" is in regard to the Appeals Board en banc decision that was affirmed by the Sixth District Court of Appeal, wherein the Court explained that AMA Guides provide guidelines for the exercise of professional skill and judgment which, in a given case, may result in ratings that depart from those based on the strict application of the AMA Guides. (*Almaraz v. Environmental Recovery Services / Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) affirmed by *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

> same, our DFEC Analyses (detailed above), pursuant to §4660 (a)(b)(c); and the 7/19/11 First Appellate Court findings (i.e., Ogilvie III), establishes that Mr. Ochoa is determined to be employable/possesses (full-time) earning capacity, i.e., qualified for, and capable of returning to (suitable) gainful employment.
> (Def. Exh. C, Howard Stauber, December 10, 2019, p. 25 [EAMS p. 52], capitalization in original deleted.)

> It is my determination that Mr. Ochoa is, unequivocally, 'amenable' to Vocational Rehabilitation/Return to the Labor Market Participation Capable. Mr. Ochoa, in my determination, with support from work and medical factor assessments, is currently employable. Pursuant to AME, QME, and PTP Opinions, i.e., Medical Evaluators as noted herein-above, while narrowing the types and categories of currently available congenial, suitable, and viable, work/occupational alternatives for Mr. Ochoa, do not preclude Mr. Ochoa [100%] from the entire labor market.
> (Def. Exh. C, p. 31 [EAMS p. 58], capitalization in original deleted.)

The parties proceeded to trial on December 1, 2020. Applicant's counsel objected to defendant's Exhibits C and D being admitted into evidence. Over counsel's objection, the WCJ admitted both exhibits into evidence. (Minutes of Hearing and Summary of Evidence (MOH/ SOE), December 1, 2020, p. 3.) The WCJ summarized applicant's testimony, relevant to the issues to be addressed herein, as follows:

> His low back pain is between a four to a five with medication on a daily basis. … Since he saw Dr. Gravina, his left foot or low back condition has not changed. … He did receive a job retraining voucher for $6,000.00. He signed up for construction course. He took some classes, … His classes prepared him to take the general contractor's license test, which he has not taken yet. The daily medication he uses [is] 1 Naproxen. He did work on a project on the Oakland Bay Bridge. He did get injured on that project. He hurt his shin. He does not recall the exact date of injury. Frank Diaz did not indicate he had prior injury because Frank Diaz did not ask him about injuries with other employment or during the longer period of time. He just asked him about injuries with this particular employer. ¶ He has sustained multiple injuries while working on the Bay Bridge project. He did receive settlement checks for those injuries. He did have a cumulative trauma claim that paid him $39,000.00. That was with respect to exposure to fumes.
> (MOH/SOE, pp. 5 – 7.)

The issues submitted for decision included permanent disability/apportionment and the proper occupational group number. (MOH/SOE, p. 2.)

DISCUSSION

We first note that as to the issue of whether defendant's exhibits C and D should or should not have been admitted into evidence, both parties make various arguments in support of their respective positions, but in the Report, the WCJ states:

> Although the exhibits are admitted into evidence, they were not taken into consideration in my determination of applicant's level of disability hence their existence in the record is irrelevant. Although I reviewed both exhibits they played no major role in the outcome of my determination.
> (Report, p. 3.)

Based thereon, the exhibits having been admitted into evidence had no effect, positive or negative, on either party and the issues regarding admitting the exhibits into evidence are irrelevant, moot, and will not be further addressed.

Regarding the issue of apportionment, an award, order or decision by the Appeals Board must be supported by substantial evidence in light of the entire record. (§§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) The opinion of an agreed medical evaluator chosen for expertise and neutrality should be followed absent good reason that the opinion is not persuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) However, if as here, the doctor states that a portion of the injured worker's disability is caused by a degenerative condition, the physician must explain the nature of the degenerative disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for the percentage of the disability assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Having reviewed Dr. Gravina's reports and deposition testimony, it is clear that he discussed apportionment several times, but at no point did he discuss the "how and why" analysis described in *Escobedo v. Marshalls, supra.* Thus, his reports do not constitute substantial evidence as to the issue of apportionment.

It is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289]; *Bolanos v. Workers' Comp. Appeals Bd.* (2014 W/D) 79 Cal.Comp.Cases 1531.) Applicant has the burden of establishing the

percentage of permanent disability caused by the industrial injury and defendant has the burden of establishing the percentage of disability caused by other factors. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*).) Otherwise stated, the employer has the burden of proof to establish apportionment of permanent disability with substantial evidence. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1107, 1114-1115 [71 Cal.Comp.Cases 1229].) Based on our review of the entire record, it is clear that defendant did not meet its burden of proof on the issue of apportionment. Although the Appeals Board does have the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, if a party fails to meet its burden of proof, the Appeals Board is not required to order the record to be further developed. (Lab. Code, §§ 5502, 5701, 5906; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd*. (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290]; *Guzman v. Workers' Comp. Appeals Bd*. (2013 W/D) 78 Cal.Comp.Cases 893.) Under the circumstances of this matter, it is appropriate that applicant receive an un-apportioned award of permanent disability indemnity.

Applicant's argument that he has rebutted the permanent disability rating schedule (PDRS) appears to be based on the reports from his vocational rehabilitation consultant Mr. Diaz. As the WCJ explained in her Report:

> [I]t was my finding that Mr. Diaz's report is not substantial evidence. Mr. Diaz emphasizes in his report that applicant's pain level in addition to his work restrictions prevents him from returning to the open labor market. Mr. Diaz relies on subjective reporting of applicant's pain level. He describes applicant as being in constant pain. ¶ … The vocational counsellor's assessment has to be based on reliable facts. Mr. Diaz states that he took the work restrictions provided by Dr. Gravina together with applicant's chronic pain and determined that applicant would not be employable in the open labor market. Mr. Diaz simply throws out the term chronic pain as though such terminology in and of itself would have some level of significance. The term itself has no significance without associating it with some description of the level of pain that is experienced by the injured worker. Mr. Diaz fails to do this. ¶ During trial applicant testified that his low back pain was between a 4-5 with medication, on a daily basis. He did not mention any pain in his left foot, only numbness and tingling. During cross examination the applicant testified that the daily medication he uses is 1 Naproxen. Applicant's trial testimony does not support Mr. Diaz's assessment of significant pain preventing employability. ¶ Applicant participated in vocational retraining by taking classes so that he could take the general contractor's license test. He has taken the classes he needs to take the test. He has yet to take the test.

> Applicant provided no explanation as to why he has not taken the general contractor's test. Mr. Diaz for some reason decided in his report that applicant was denied the opportunity to obtain his contractor's license. (App. Exhibit 1, page 4, paragraph 7). ¶ Applicant provided no explanation as to why he did not sit for his contractor's license test during trial. If [applicant] was denied the ability to get a contractor's license, he would have said so during the trial. Instead all the applicant said was that he has completed all of the course work required but is yet to take the licensing test.
> (Report, pp. 6 – 7.)

Again, having reviewed the entire record, we agree with the WCJ's analysis and conclusion that the reports from Mr. Diaz do not constitute substantial evidence rebutting the 2005 PDRS.

We also agree with the WCJ that applicant's disability is properly rated by combining factors of disability using the Combined Values Chart (CVC) as opposed to adding the factors pursuant to our *Kite* decision. (*Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ den.)].) When AME Dr, Gravina was asked if applicant's factors of disability should be added, he explained:

> I wouldn't -- I'll tell you why. I have already used a Guzman [analysis] to get a more appropriate rating. So I think that if you were to add them -- I think it will be overemphasizing his problem. Whereas I think if you don't use a Guzman you are underemphasizing his problem. ¶ I'm trying to get the most accurate representation of his problem. You can't get it with a straight rating. By adding it I think you are overemphasizing it.
> Joint 102 (Joint Exh. 102, p. 14.)

Dr. Gravina clearly explained his reasoning for doing a "Guzman analysis" and he explained why combing those factors of disability more accurately defined applicant's permanent disability than if the factors were added. The trial record contains no evidence to the contrary and applicant's arguments are not evidence.

Finally, the purpose of considering an employee's occupation is "to aid in determining 'the relative effects of disability to various parts of the body taking into account the physical requirements of various occupations.'" (*Holt v. Workers' Comp. Appeals Bd.* (1986) 187 Cal. App. 3d 1257, 1261 [51 Cal.Comp.Cases 576].) In order to properly rate an injured worker's disability:

> Simply determine the basic functions and activities of the occupation under consideration and relate it to a comparable scheduled occupation to determine the appropriate group number. ¶ After establishing the occupation and group number, turn to Section 4 to determine the occupational variant.
> (PDRS, Section 3 - Occupational and Group Numbers, 3 - 1.)

Here, as to the physical requirements of his work for defendant, the WCJ summarized applicant's testimony indicating that, "He would have to climb. … Bending was a requirement of the job. You have to clean as you're working, so he did have to bend. He would have to push and pull things. You have to be able to release the rig." (MOH/SOE, p. 5.) However, Mr. Diaz stated that, "Mr. Ochoa's work as a pile driver and welder required him to stand for prolonged periods, perform repeated lifting, repeated climbing, and repeated lifting, pushing, pulling, bending, kneeling, and stooping." (App. Exh. 1, p. 6.) Due to these inconsistencies, we cannot determine the appropriate occupational variant to be used and therefore, we are not able to rate applicant's permanent disability. As noted earlier, the Appeals Board does have the discretionary authority to develop the record when needed in order to fully adjudicate the issues submitted for decision. (Lab. Code §§ 5701, 5906). In this matter we must defer the issue of applicant's permanent disability pending development of the record regarding the physical demands of applicant's work while employed by defendant in order to determine the correct occupational variant, and in turn, to enable the proper rating of applicant's permanent disability.

Accordingly, we affirm the F&A, except that we amend the F&A to find that the opinions of Richard F. Gravina, M.D., do not constitute substantial evidence regarding apportionment; to include a finding that the reports from Frank P. Diaz do not constitute substantial evidence that applicant is 100% disabled as a result of his injury; and to defer the issues of the proper occupational group number; the percentage of permanent disability caused by applicant's injury; and the amount of the fee to be awarded to applicant's counsel. Based thereon, we amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 12, 2021 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

1. Applicant, Ventura Ochoa, while employed as a welder/pile driver, by Foundation Constructors, in Oakley, California, sustained injury to his left foot and low back on October 27, 2015. At the time of injury the employer's workers' compensation carrier was Starr Indemnity and Liability Company, administered by Sedgwick Claims Management Services; the issue of the proper occupational group number is deferred pending development of the record.

2. Applicant has sustained permanent disability as a result of the October 27, 2015 injury; the factors of permanent disability should be combined per the Combined Values Chart rather than added; the opinions of agreed medical examiner Richard F. Gravina, M.D., do not constitute substantial evidence regarding apportionment; the reports from Frank P. Diaz do not constitute substantial evidence that applicant is 100% disabled as a result of his injury; the percentage of permanent disability caused by applicant's injury is deferred pending development of the record. Defendant is entitled to credit for all permanent disability advances made to date.

* * *

4. Applicant's attorney is entitled to a 15% fee; the actual amount of the fee is deferred pending development of the record. The fee is to be commuted from the far end of the award.

AWARD

* * *

a. The Award of permanent disability indemnity benefits is deferred.

* * *

c. The Award of attorney fees is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 23, 2023

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

VENTURA OCHOA
WELTIN LAW
FINNEGAN, MARKS, THEOFEL & DESMOND

TLH/abs

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