WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BELINDA VERNON, ***Applicant***

vs.

KAWEAH DELTA HEALTH CARE DISTRICT, permissibly self-insured; adjusted by INTERCARE HOLDING INSURANCE SERVICES, ***Defendants***

Adjudication Number: ADJ9375862
Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the "Findings of Fact, Award, and Opinion on Decision" (F&A) issued on October 19, 2020, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was not 100% permanently totally disabled and instead awarded 56% permanent partial disability. The WCJ did not include impairment for sleep disorder in the rating per Labor Code[1], section 4660.1(c)(1) finding it a compensable consequence of a physical injury. The WCJ awarded reimbursement for out-of-pocket medical expenses but did not specify whether the award included a demand of wage loss from applicant's spouse.

Applicant argues that the WCJ erred in not finding 100% disability because applicant was found to be incapacitated from earning by the Social Security Disability Insurance (SSDI) program when she was awarded benefits in that forum. Applicant further argues that her impairment to sleep disorder is compensable as it is a direct injury and not a compensable consequence injury. Finally, applicant argues that the WCJ's award of reimbursement failed to address the demand of wage loss.

[1] All future references are to the Labor Code unless noted.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the WCJ's October 19, 2020 F&A and return the matter to the trial level for further development of the record.

FACTS

Applicant worked for defendant as an HR analyst and educator when she sustained industrial injury to her right knee on December 9, 2013. (Minutes of Hearing and Summary of Evidence, August 17, 2020, p. 2, lines 3-6.) Applicant developed chronic pain syndrome, insomnia due to pain, and gastrointestinal intolerance as compensable consequences of her injury. (*Ibid*.)

This matter proceeded to trial primarily on the issues of reimbursement of out-of-pocket medical expenses and applicant's permanent disability rating, with applicant claiming permanent total disability through vocational expert reporting. (*Id*. at p. 2, line 24, through p. 3, line 9.)

1. Medical Evidence of Disability

Applicant was evaluated by orthopedic agreed medical evaluator (AME) Steven Feinberg, M.D., who took the following history of injury:

> [Applicant] was walking outside the building at 10:50am and she slipped on ice and landed on her right knee cap. Her knee cap shattered and the bone poked through her pants. The femur/tibia was laying at a strange angle. The femur received the biggest impact. Her patella was crushed instantly. She was laying on the ground at an awkward position. Two individuals that witnessed her fall called 911 and she taken to the hospital. She was on the ground for 2 hours before she was able to be mobilized. It was super slippery and the firemen almost slipped as well. She had emergency surgery at Kaweah Hospital.

(Joint Exhibit EE, Report of Steven Feinberg, M.D., August 9, 2018, p. 2.)

Applicant had a difficult recovery, which included three surgeries. (*Id*. at p. 13.) Knee replacement surgery was recommended, but applicant was advised that it could fail given the amount of bone loss and she elected not to proceed. (*Id*. at p. 8.)

Applicant's symptoms in the knee include constant sharp right knee pain with aggravation from walking, daily swelling which increases with prolonged standing, limping, and instability in the knee. (*Id*. at pp. 8-9.)

Dr. Feinberg assigned 30% whole-person impairment (WPI) using an *Almaraz-Guzman* analysis. (*Id*. at p. 15.) Dr. Feinberg assigned work restrictions limiting applicant to sedentary work. (*Ibid*.) Dr. Feinberg found that applicant's disability was 100% industrial. (*Ibid*.)

In supplemental reporting, Dr. Feinberg clarified that he assigned the sedentary work restriction using the following definition from the Department of Labor's Dictionary of Occupational Titles:

> Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

(Joint Exhibit BB, Report of Steven Feinberg, M.D., January 4, 2019, p. 4.)

Applicant was evaluated by qualified medical evaluator (QME), internist David Baum, M.D., who took the following history of sleep disturbance:

> "The pain never goes away." " ... every time I take a step it's painful." She has difficulty sleeping due to pain in her right knee and difficulty finding a comfortable position with her right knee. Norco 5 mg tablets have slightly alleviated her pain although the medication does not help her sleep. She sleeps three to four hours on an average night. She awakens two or three times during the night. She usually goes to sleep around 10:00 PM and finally awakens around 5:00 AM.

(Joint Exhibit FF, Report of David Baum, M.D., September 19, 2018, p. 5.)

Dr. Baum assigned 9% WPI for applicant's upper digestive tract disorder and 12% WPI for applicant's sleep disturbance. (*Id*. at p. 25.) Applicant was not given work restrictions for either of these impairments.

2. Vocational Evidence

Applicant was evaluated by vocational expert, Gene Gonzalez, who authored four reports in evidence. (Applicant's Exhibits 8 through 11.)

Mr. Gonzalez took a history that applicant has both a bachelor's degree and a master's degree. (Applicant's Exhibit 11, Report of Gene Gonzalez, September 14, 2017, p. 9.) He opined that applicant was incapable of rehabilitation, in part, as follows:

> Ms. Vernon has already earned a graduate-level degree, and clearly there are no nonindustrial vocational factors preventing her from participating in educational training. However, Ms. Vernon's industrially related impairments have resulted in a chronic pain syndrome, as reported by PQME Dr. Baum. He also noted that there is no effective treatment for this condition, thus there is no pain relief for Ms. Vernon. In addition, Ms. Vernon has insomnia due to pain, which in all likelihood has caused her reported chronic fatigue.
>
> The combination of fatigue limitations and no pain relief lead me to opine that Ms. Vernon will not be able to complete educational training. Her chronic fatigue will, in all reasonable vocational probability, result in slowed productivity and lapses in concentration and focus. Additionally, Ms. Vernon's chronic pain will continue to affect her ability to perform tasks.

(Applicant's Exhibit 8, Report of Gene Gonzalez, January 15, 2020, p. 8.)

Mr. Gonzalez conducted vocational testing, which, in part, found that applicant has the intellectual capacity of someone in the fourth percentile which was interpreted as "definite below average in intellectual capacity." (*Id*. at p. 5.)

Mr. Gonzalez reviewed a functional capacity examination by applicant's primary treater, which was not offered into evidence. (Exhibit 11, *supra* at p. 34.) Mr. Gonzalez went on to conduct his own functional capacity examination based upon applicant's subjective complaints of what she felt capable of doing. (*Ibid*.) Mr. Gonzalez generically concluded that applicant was not capable of employment on the open labor market. (*Id* at pp. 42-44.)

Applicant was evaluated by defendant's vocational expert, Everett O'Keefe, who authored one report in evidence. (Defendant's Exhibit G.) In general, Mr. O'Keefe found that applicant was amenable to rehabilitation through both on-the-job training and via direct placement. (Defendant's Exhibit G, Report of Everett O'Keefe, September 10, 2019, p. 26.) Mr. O'Keefe

further found that applicant had a 39% diminished future earning capacity on the open labor market. (*Id*. at p. 26.)

3. Out-of-pocket Medical Expenses

The WCJ issued the following findings of fact and award as to out-of-pocket medical expenses:

> FINDINGS OF FACT
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> 10. There are no self-procured medical treatment bills submitted for review and determination; (a) Medical-legal expenses shall be paid by Defendant, the bills of Mr. Gonzales are medical-legal in nature, with all associated rights and defenses intact; (b) However, there is an issue labeled as "self-procured medical" when in reality it is an issue of reimbursement for LC 4621(d) and 4622 (c) expenses: as such receipts for expenses were submitted (Exhibit 21) without contradiction or objection, these expenses are reimbursable with penalty and interest.
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> AWARD
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> C. Applicant is awarded payment of all unpaid medical-legal expenses for the reports of Mr. Gonzales as per finding number 10(a).
>
> D. Applicant is awarded reimbursement of all expenses related to attending medical or medical-legal appointments, as per finding number 10(b), in addition, a 10% penalty and 7% interest are to be added to this amount due to the untimely payment of same, to be calculated by the parties.

(F&A, October 19, 2020, pp. 2-3.)

Applicant's Exhibit 21 is a conglomeration of documents attached to a demand for reimbursement of out-of-pocket medical expenses. (See generally, Applicant's Exhibit 21.) The exhibit begins with a cover letter from applicant's attorney to defendant, which states: "We are also submitting the loss of wages for Jerome C. Vernon, husband, who transported and was the care provider for Mrs. Vernon for a total of $8,000." (*Id*. at p. 1.) Also in the exhibit is a letter signed by applicant indicating that check stubs for applicant's spouse were enclosed with a lost wage demand. (*Id*. at p. 8.) However, no such check stubs are found in the document.

DISCUSSION

1. Rebuttal of the PDRS under *Ogilvie*

In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes I*"), the Appeals Board held that Labor Code section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, and that the Labor Code makes no statutory provision for "vocational apportionment." The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. The Board explained that an analysis of whether there are valid sources of apportionment is still required, even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the industrial injuries. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*").

In this case, applicant's vocational expert's report does not constitute substantial evidence as the evaluator has incorrectly and improperly interjected his own medical opinions into the case regarding applicant's functional limitations. A vocational evaluator does not create medical facts in a case. Vocational experts review the medical record created by the doctors and reach conclusions as to applicant's vocational feasibility based upon that record.

Here, Mr. Gonzalez's reporting suffers from multiple issues. Foremost, it is not well-written and not well-reasoned. To constitute substantial evidence, among other things, a report "must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) The vocational reporting does not fully establish why applicant is incapable of finding employment on the open labor market. It is also unclear how someone with a graduate-level education tested in the fourth percentile of intellectual capacity.

It is further unclear whether Mr. Gonzalez is relying upon his own subjective assessment of applicant's functional capacity to determine whether she is capable of rehabilitation and/or work. Mr. Gonzalez is not a doctor. He cannot take his own medical history or provide his own medical opinions as to applicant's functional capacity. Furthermore, he cannot rely upon applicant's subjective beliefs alone as to functional capacity. The vocational expert must rely upon expert medical evidence. If insufficient medical evidence exists, the vocational expert must inform the parties, who may then proceed to obtain the needed evidence. Only a medical doctor may take applicant's subjective beliefs into account along with the objective medical data to ascribe work restrictions. For these reasons, we agree with the WCJ that the current reporting does not constitute substantial evidence.

Next, applicant argues that because she was found incapable of working through SSDI, that finding should inform the analysis here. It does not.

Where applicant is seeking to rebut the ratings schedule and have a finding issue that she is permanently totally disabled, applicant must prove two things: 1) she is not amenable to rehabilitation due to the industrial injury, and thus 2) she is not capable of competing on the open labor market. (*Ogilvie v. Workers' Comp. Appeals Bd.*, 197 Cal. App. 4th 1262, 1277, 129 Cal. Rptr. 3d 704.) In workers' compensation, applicant must show that the cause of her total disability is industrial. **SSDI does not analyze the cause of the disability in determining whether applicant qualifies.** (See, 20 CFR 404.1594.) Accordingly, SSDI has no res judicata effect upon the question of total disability in workers' compensation.

While approval of SSDI may indicate to the parties that permanent total disability may exist and should be investigated, it does not, by itself, establish permanent total disability on an industrial basis.

2. Sleep add-on.

Next applicant argues it was error to exclude a permanent disability add-on for sleep impairment. Section 4660.1(c) states, in pertinent part:

> (c) (1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

(§ 4660.1(c)(1).)

> Causation of an injury may be either direct or as a compensable consequence of a prior injury. More precisely, an injury may be directly caused by the employment. Alternatively, a subsequent injury is a compensable consequence of the first injury where it "is not a new and independent injury but rather the direct and natural consequence of the" first injury. (*Carter v. County of Los Angeles* (1986) 51 Cal. Comp. Cases 255, 258 (Appeals Board en banc).) The "first injury need not be the exclusive cause of the second but only a contributing factor to it … So long as the original injury operates even in part as a contributing factor it establishes liability." (*State Compensation Ins. Fund v. Industrial Acc. Com*. (*Wallin*) (1959) 176 Cal. App. 2d 10, 17 [24 Cal. Comp. Cases 302].) In other words, if the first injury is a contributing cause of the second injury, the second injury is a compensable consequence of the first injury. Whereas the first injury is directly caused by the employment, a compensable consequence injury is indirectly caused by the employment via the first injury.

(*Wilson v. State of CA Cal Fire et al*. (2019) 84 Cal.Comp.Cases 393, 403-404 [2019 Cal. Wrk. Comp. LEXIS 29] (Appeals Board en banc).)

Here, the medical record is clear that applicant's sleep disorder is a compensable consequence injury. It is caused by pain from her underlying orthopedic condition. Applicant has not established any direct injury to sleep in this matter. Accordingly, the WCJ correctly excluded sleep from the rating per the mandate of section 4660.1(c).

3. Out-of-pocket Medical Reimbursement

The final issue raised is the request for out-of-pocket medical reimbursement, specifically, a request for lost wages for applicant's husband. On this issue we will reverse the WCJ and remand the matter for further development.

The WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (§ 5313; see also, *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

Here, the Findings of Fact and the Order regarding out-of-pocket medical reimbursement are vague. The WCJ's award references all expenses listed in Exhibit 21, which ostensibly would include the request for $8,000.00 in lost wages. In the Report, the WCJ indicates that the wages were not included in the award. This requires further clarification. Upon return, and if the parties are unable to agree to an amount of reimbursement, the WCJ should make specific findings as to the amount of reimbursement defendant must pay.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's Findings of Fact, Award, and Opinion on Decision" (F&A) issued on October 19, 2020, and return the matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, and Opinion on Decision issued on October 19, 2020, is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 23, 2024

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

BELINDA VERNON
LAW OFFICES OF VALDEZ & VALDEZ
LAW OFFICES OF BRADFORD & BARTHEL, LLP

EDL/mc

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