WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CYNTHIA PUCKETT, *Applicant*

vs.

STATE OF CALIFORNIA - IHSS, legally uninsured and administered by INTERCARE, *Defendants*

Adjudication Number: ADJ11316047
San Francisco District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the January 16, 2024 Findings of Fact and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an in-home support worker during the cumulative period ending May 20, 2018, sustained industrial injury to her heart, hypertension, bilateral knees, bilateral hands, cervical spine, thoracic spine, and psyche. The WCJ found that applicant sustained permanent partial disability of 81 percent and awarded corresponding indemnity and a life pension.

Applicant contends that the vocational evidence supports an award of permanent and total disability.

We have not received an answer from any party. Applicant has filed a Reply brief in response to an Answer purportedly filed by defendant but did not request approval to file that document. Notwithstanding applicant's failure to request leave to file the supplemental reply to defendant's Answer, as required by Workers' Compensation Appeals Board (WCAB) Rule 10964, (Cal. Code Regs., tit. 8, § 10964.), we approve its filing and it has been reviewed.[1]

[1] In the future, applicant is cautioned to request leave of the Appeals Board when filing supplemental pleadings with the Appeals Board. WCAB Rule 10964(a) (Cal. Code Regs., tit. 8, § 10964(a)) provides: "When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board."

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have 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 the February 13, 2024 F&A, and return the matter to the trial level for further proceedings.

FACTS

Applicant sustained injury arising out of and in the course of employment (AOE/COE) to her heart and hypertension, and claims to have sustained injury to her bilateral knees, psyche, bilateral shoulders, bilateral hands, cervical spine, thoracic spine, and lumbar spine while employed as an in-home support worker by defendant State of California – IHSS during the period ending May 20, 2018.

The parties have selected Qualified Medical Evaluators (QMEs) Janet Lord, M.D., in physical medicine, Richard Levy, M.D., in cardiovascular medicine, and QME Kathleen Longwell, Ph.D., in psychology. Applicant has also selected Scott Simon as her expert in vocational rehabilitation.

On March 24, 2022, the parties proceeded to trial, framing issues of, in relevant part, body parts injured, permanent disability, and apportionment. (Minutes of Hearing and Summary of Evidence (Minutes), dated March 24, 2022, at p. 3:45.) The applicant's testimony was adduced under direct and cross-examination, and the matter submitted for decision the same day.

On June 16, 2022, the WCJ issued his Findings of Fact and Award, determining in relevant part that applicant had sustained injury arising out of and in the course of employment (AOE/COE) to her heart, hypertension, bilateral knees, bilateral hands, cervical spine, thoracic spine, and psyche, but did not sustain injury AOE/COE to the lumbar spine. (Findings of Fact, dated June 16, 2022, Nos. 2 & 3.) The WCJ deferred issues related to applicant's claim of injury to the bilateral shoulders as well as a final determination of aggregate permanent disability.

The WCJ's Opinion on Decision explained that the reporting of applicant's vocational expert Mr. Simon was not deemed to be substantial evidence. (Opinion on Decision, dated June 16, 2022, at p. 15.) The WCJ noted that records concerning applicant's spinal fusion and hearing loss issues were not reviewed by Mr. Simon, resulting in an incomplete medical history.

The WCJ also felt that the vocational expert's conclusion that applicant's psychiatric and internal medicine conditions had a synergistic effect on applicant's orthopedic condition was conclusory, and contrary to the opinions of the evaluating physicians. (*Ibid.*) In addition, the WCJ noted that the vocational reporting did not adequately account for the nonindustrial apportionment described by each evaluating physician. Accordingly, the WCJ deemed the reporting of Mr. Simon not substantial evidence. (*Ibid*.)

The parties thereafter obtained supplemental QME reporting, and on October 26, 2023, proceeded to trial. The issues framed for decision were injury and permanent disability related to the bilateral shoulders, final permanent disability and apportionment, and attorney fees. (Minutes of Hearing, dated October 26, 2023, at p. 2:22.)

On January 16, 2024, the WCJ issued his F&A, determining in relevant part that applicant sustained injury AOE/COE to the bilateral shoulders. The WCJ further determined that applicant sustained 82 percent aggregate permanent disability (including the disability identified in the June 16, 2022 Findings of Fact and Award), and awarded corresponding indemnity including a life pension. (Award, Nos. (a) and (b).)

Applicant's Petition contends that the vocational evidence supports a finding that applicant is permanently and totally disabled. Applicant cites to the reporting of Mr. Simon, which avers applicant "would not be able to reliably participate day after day due to issues related to managing her [Activities of Daily Living (ADL)s] without assistance, pain and the multiple effects of the impairment directly stemming from the industrial injury alone." (Petition, at p. 2:20, citing Ex. 18, Report of Scott Simon, M.S., dated June 21, 2021, at p. 28.) Applicant further contends that the reporting of Mr. Simon establishes that the synergistic effect of applicant's orthopedic, cardiovascular and psychiatric injuries have rendered her permanently and totally disabled, "based solely upon the effects of the industrial injury…." (Petition, at p. 3:13, citing Ex. 18, Report of Scott Simon, M.D., dated June 21, 2021, at p. 32.) Accordingly, applicant submits that she is permanently and totally disabled without apportionment.

Applicant's Reply to Defendant's Answer to Petition for Reconsideration avers the petition addresses issues of applicant's final permanent disability, which were determined in the January 16, 2024 F&A, and that a prior Petition for Reconsideration would have been premature. (Applicant's Reply, dated March 4, 2024, at p. 1:20.)

The WCJ's Report notes that in addition to being based on an incomplete medical record, the vocational reporting is premised in part on injury to the low back, which the WCJ later determined to be nonindustrial. (Report, at p. 7.) The WCJ also observes that the vocational reporting fails to consider the non-industrial apportionment provided by various QMEs and applies impermissible "vocational apportionment" in his determination that applicant is totally and permanently disabled, without apportionment. Noting that there is no challenge to the WCJ's ratings utilizing the current rating schedule, the WCJ recommends we deny applicant's Petition. (*Id.* at p. 8.)

DISCUSSION

Applicant contends the vocational expert reporting constitutes substantial evidence and supports a finding that she is permanently and totally disabled on a purely industrial basis.

In *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30I] (Appeals Board en banc) (*Nunes I*), we held that Labor Code[2] section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, but that the Labor Code makes no statutory provision for "vocational apportionment."

We further held that vocational evidence may be used to address issues relevant to the determination of permanent disability. While the Permanent Disability Rating Schedule (PDRS) is presumptively correct (see *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (2010) 187 Cal.App.4th 808, 826 [75 Cal.Comp.Cases 837]), "a rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning capacity is greater than that reflected in the PDRS." (*Nunes I, supra*, 88 Cal.Comp.Cases at p. 749.) Among the methods described for challenging a rating obtained under the PDRS was establishing that "the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating." (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624] (*Ogilvie*).) Our opinion in *Nunes I* made clear that "[t]he same considerations used to evaluate whether a medical expert's opinion constitutes substantial evidence are equally applicable to vocational reporting … [i]n order to constitute substantial evidence, a vocational expert's opinion

[2] All further references are to the Labor Code unless otherwise noted.

must detail the history and evidence in support of its conclusions, as well as "how and why" any specific condition or factor is causing permanent disability." (*Id.* at p. 751.)

We further held that while vocational evidence may be used to rebut the PDRS, such vocational evidence must nonetheless address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. (*Id.* at pp. 743-744.) Examples of impermissible vocational evidence included assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions, or was able to adequately perform their job, or suffered no wage loss prior to the current industrial injury. (*Id.* at p. 754.) Accordingly, we concluded:

> Therefore, 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 current industrial injury.
>
> (*Ibid.*)

The applicant in *Nunes* filed a Petition for Reconsideration of our en banc decision, and on August 29, 2023, we issued our decision *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. P.D. LEXIS 46] (Appeals Board en banc) (*Nunes II*). Therein, we held that the validity of an apportionment analysis described by an evaluating physician is "not assumed, and must be carefully weighed and determined by the WCJ." (*Id.* at p. 897.) We provided various examples of when an applicant might be entitled to an unapportioned award based on vocational evidence, such as when "the WCJ determines that no evaluating physician has identified valid legal apportionment," or when "the evaluating physician has carefully considered factors of apportionment, but has nonetheless determined that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability." (*Id.* at p. 898.) However, "when an evaluating physician identifies a valid basis for apportionment, such apportionment must be considered as part of any determination of permanent disability, including a vocational expert's evaluation of an injured worker's feasibility for vocational retraining." (*Id.* at p. 899.) Accordingly,

we affirmed our decision in *Nunes I* that the vocational reporting in evidence did not meet the minimum standards necessary to be considered substantial vocational reporting, and that principles of due process required development of the record.

Here, we believe a similar analysis applies to the June 21, 2021 report of vocational expert Mr. Simon. The report reviews the submitted medical record, and further summarizes Mr. Simon's findings upon evaluation and testing of the applicant, as well as the applicant's Activities of Daily Living (ADLs). (Ex. 18, Report of Scott Simon, M.D., dated June 21, 2021 at p. 6.) Following an assessment of applicant's transferable job skills, Mr. Simon concludes that "although Ms. Puckett may meet the minimum skillset for employment in the open labor market, the applicant would not be able to perform in the least physically demanding positions even within an accommodating work environment." (*Id.* at p. 25.) With respect to applicant's feasibility for vocational retraining, Mr. Simon concludes that "Ms. Puckett is not amenable to rehabilitation or sustaining employment in the open labor market," and has thus "sustained a 100% loss of future earning capacity, labor market access and amenability." (*Id.* at pp. 32-33.)

Mr. Simon's report acknowledges that the QMEs in psychology, orthopedic, and cardiovascular medicine all identified nonindustrial apportionment of applicant's permanent disability. (*Id.* at pp. 36-37.) However, in a discussion entitled "Vocational Apportionment," Mr. Simon's report, which antedates our en banc decisions in *Nunes I* & *II*, finds that applicant's preexisting disability caused no lost time from work prior to the instant industrial injury. (*Id.* at p. 38.) The report further notes that applicant sustained no difficulty in maintaining consistent employment between 1982 and 2019. Based thereon, Mr. Simon concludes "there is no vocational apportionment for this case." (*Ibid*.)

Pursuant to our holdings in *Nunes I* & *II*, however, the reporting of Mr. Simon employs a competing methodology for the assessment of apportionment that is incompatible with section 4663. (*Nunes I, supra*, 88 Cal.Comp.Cases at pp. 743-744.) Accordingly, we agree with the WCJ's assessment that the reporting does not presently constitute substantial vocational evidence. (Report, at p. 7.) We also observe that Mr. Simon's June 21, 2021 reporting was generated more than two years prior to our June 22, 2023 decision in *Nunes I*. Additionally, discovery closed in the instant matter on September 6, 2023, shortly after our decision in Nunes II issued on August 29, 2023. (Pre-Trial Conference Statement, dated September 6, 2023.) We also note that the reporting of applicant's vocational expert was premised in part on disability arising out of

applicant's claimed lumbar spine injury, a body part which the WCJ's subsequent June 16, 2022 Findings of Fact determined to be nonindustrial. (Findings of Fact and Award, dated June 16, 2022, Findings of Fact No. 3.)

It is well established that any decision, award or order of the Appeals Board must be supported by substantial evidence in light of a review of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) Moreover, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) Accordingly, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record…the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Ibid*.)

Following our independent review of the record occasioned by applicant's Petition, we are persuaded that development of the record is consistent with principles of due process of law, and that allowing the evaluating physicians and/or vocational experts to supplement the record will provide the parties and the WCJ with a complete and comprehensive basis upon which to adjudicate the issues of permanent disability and apportionment.

Accordingly, we will grant applicant's Petition, rescind the January 16, 2024 F&A, and return this matter to the trial level for development of the record and for further proceedings and decision by the WCJ. In so doing, we remind the parties that any vocational expert opinion must account for, and address, valid apportionment identified by the evaluating physicians. (*Nunes I,*

supra, 88 Cal.Comp.Cases at p.751.) In the event that a vocational expert opines to permanent and total disability notwithstanding the presence of valid nonindustrial apportionment, the opinion must determine whether the permanent and total disability arises solely out of industrial conditions or factors, that is, exclusive of nonindustrial or prior industrial conditions or factors. (*Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman*) (2013) 218 Cal.App.4th 1137, 1142–1143 [160 Cal. Rptr. 3d 712, 78 Cal.Comp.Cases 751]; *City of Petaluma v. Workers' Comp. Appeals. Bd.* (*Lindh*) (2018) 29 Cal.App.5th 1175 [241 Cal. Rptr. 3d 97, 83 Cal.Comp.Cases 1869].

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of January 16, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the decision of January 16, 2024 is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 2, 2024

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

CYNTHIA PUCKETT
INTERCARE
KARLIN HIURA & LASOTA
OFFICE OF THE DIRECTOR-LEGAL UNIT (OAKLAND)
SIBTF
STATE OF CALIFORNIA IHSS
WYMAN & HEGWER

SAR/abs

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