WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ILENE GELFAND, *Applicant*

vs.

THE KROGER COMPANY dba RALPHS, permissibly self-insured, administered by SEDGWICK CMS, *Defendants*

Adjudication Numbers: ADJ10080239; ADJ10079949
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the January 17, 2024 Joint Findings and Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a sales manager by Ralphs on November 14, 2014, sustained industrial injury to her left leg, psyche, back, bilateral feet and right wrist. The WCJ also found that applicant, while similarly employed from March 1, 1979, to July 1, 2015, sustained injury to her psyche, in the form of peripheral vascular disease to her lower extremities, bilateral knees, and neck. The WCJ found, in relevant part, that applicant had sustained permanent partial disability arising out of both injuries, but that the medical and vocational evidence did not support a finding that applicant's disability was permanent and total.

Applicant contends that the synergistic effects of her multiple impairments preclude vocational retraining, thus rendering applicant permanently and totally disabled. Applicant further contends that in choosing not to follow the opinions offered by applicant's vocational expert, the WCJ relied on the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30], which issued shortly before the close of discovery in the present matter. Applicant contends the medical and vocational experts in this

matter should be afforded the opportunity to update their reporting pursuant to the holdings set forth in *Nunes, supra*.

We have received an Answer from defendant. 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, the Answer, 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 rescind the January 17, 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.

FACTS

Applicant has two pending claims of injury. In Case No. ADJ10080239, applicant sustained injury arising out of and in the course of her employment (AOE/COE) to her left leg, and claims to have sustained injury in the form of peripheral vascular disease, Complex Regional Pain Syndrome, neck, back, both shoulders, both wrists, both hands, thrombophlebitis of the left leg, plantar osteitis, psyche, and bilateral knees, while employed as a Sales Manager by Ralphs on November 14, 2014.

In Case No. ADJ10079949, applicant claims to have sustained injury in the form of peripheral vascular disease to the lower extremities, bilateral legs, Complex Regional Pain Syndrome, neck, back, bilateral shoulders, bilateral wrists, bilateral hands, thrombophlebitis of the left leg, plantar fasciitis, psyche, and the bilateral knees while employed as a Sales Manager by Ralphs from March 1, 1979 to July 1, 2015.

The parties have selected Lawrence Feiwell, M.D., as the Agreed Medical Evaluator (AME) in orthopedic medicine, and Joseph Vanderlinden, M.D., as the AME in vascular medicine. The parties have further selected Seymour Levine, M.D., as the Qualified Medical Evaluator (QME) in rheumatology, Linslee Egan, M.D., as the QME in psychiatry, and Jayson Hymes, M.D., as the QME in pain management. Additionally, applicant has obtained vocational reporting from Anothony Reyes, while defendant has obtained vocational reporting from Christopher Meyers.

On June 21, 2023, the parties proceeded to trial, framing issues including parts of body injured, permanent disability and apportionment, and the substantiality of applicant's vocational expert reporting. The WCJ heard witness testimony and continued the trial to an additional date.

On October 3, 2023, trial proceedings continued with additional witness testimony. The parties submitted the matter for decision the same day.

On January 17, 2024, the WCJ issued her F&A, determining in relevant part that applicant sustained injury on November 14, 2014 to the left leg, psyche, back, bilateral feet and right wrist, resulting in 10 percent permanent disability. (Findings of Fact as to ADJ100080239, No. 9.)

The WCJ further determined that applicant sustained injury from March 1, 1979 to July 1, 2015 to her psyche, peripheral vascular disease to her lower extremities, bilateral knees, and neck, resulting in 65 percent permanent disability. (Finding of Fact as to ADJ10079949, No. 9.) The WCJ found that the reporting of applicant's vocational expert Anthony Reyes did not support a finding of permanent and total disability because it did not constitute substantial evidence and because it failed to properly account for the apportionment identified by the evaluating physicians. (Opinion on Decision, at p. 10.)

Applicant's Petition avers there is a synergistic effect of the multiple impairments identified by the various evaluating physicians that render applicant not feasible for vocational rehabilitation, and permanently and totally disabled as a result. (Petition at p. 5:6.) Applicant contends that her orthopedic injuries have profoundly compromised her activities of daily living, and that her impairment is compounded by her difficulty with memory and concentration caused by her medications. (*Id.* at p. 5:24.) Applicant cites to her vocational expert who asserts that "vocational apportionment does not necessarily follow medical apportionment," and that applicant would still be able to pursue her customary work without limitations but for her industrial injuries. (*Id.* at p. 7:25.) Applicant further submits that our decision in *Nunes, supra,* 88 Cal.Comp.Cases 741, issued only after the close of discovery on April 4, 2023, and that the medical and vocational evaluators should be afforded the opportunity to provide supplemental reporting responsive to the *Nunes* decision. (*Id.* at p. 9:10.)

Defendant's Answer notes that the parties were afforded the opportunity to brief the effects of the *Nunes* en banc decisions prior to submission of the matter for decision. (Answer, at p. 4:1.) Defendant also asserts that irrespective of the vocational apportionment issue, the WCJ determined

that the reporting of applicant's vocational expert was deficient, and that the report itself was not substantial evidence. (*Id.* at p. 4:13.)

The WCJ's Report begins by noting that applicant's assertion that her impairments have an aggregate synergistic effect is not supported by the opinions of the medical evaluators. (Report, at p. 2.) The WCJ also notes that the reporting of applicant's vocational expert Mr. Reyes fails to account for applicant's return to work after her injury, or the fact that applicant obtained a new position after leaving Ralphs. (*Id.* at pp. 5-6.) The WCJ also notes that the fact that applicant only stopped working due to the COVID-19 pandemic is not adequately addressed in the reporting of Mr. Reyes. The WCJ also acknowledges that our decision in *Nunes, supra*, 88 Cal.Comp.Cases 741 issued only after the close of discovery in the instant matter, but further notes that applicant did not request that the record be supplemented, and instead advanced arguments in trial briefing addressing the holdings of the *Nunes* decision. (*Id.* at p. 5.)

DISCUSSION

We begin our discussion with applicant's assertion that the synergistic effects of multiple impairments render applicant unable to benefit from vocational rehabilitation. Applicant avers her "impairments have synergistic, negative impact on her overall functioning such that she would be unable to perform any type of work." (Petition, at p. 5:28.) Applicant asserts that her physical and psychiatric impairments combine to materially interfere with her ability to reenter the open labor market, and as a result, the combination of her various impairments results in impairment greater than the individual ratings. (*Id.* at p. 6:2.) However, to the extent that this argument contemplates a departure from the presumptively correct Permanent Disability Rating Schedule, any such assertion must be supported by the considered opinions of the medical evaluators. (See, e.g., *Borela v. State of California/Dept. of Motor Vehicles* (May 13, 2014, ADJ7181658) [2014 Cal. Wrk. Comp. P.D. LEXIS 217] [*medical* evidence required for departure from presumptively correct PDRS]; *Cabacungan v. Cal. Dep't of Corr. & Rehab* (September 17, 2020, ADJ742466) [2020 Cal. Wrk. Comp. P.D. LEXIS 311] [single reference to entwined disabilities by vocational expert insufficient to rebut PDRS].) Here, no evaluating physicians have opined to a synergistic effect justifying a departure from the rating schedule. Accordingly, we concur with the WCJ's determination that "[a]bsent evidence of a basis for adding the impairments, rather than combining

them using the CVC as the WCJ did in this case the rating should remain undisturbed." (Report, at p. 2.)

Applicant next 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[1] 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 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

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

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.
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> (*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, the WCJ determined that the reporting of applicant's vocational expert Mr. Reyes was not substantial evidence in part because the expert failed to account for valid medical apportionment as discussed in *Nunes I*. The WCJ's Opinion on Decision observes that:

> [T]he *Nunes* decisions mandates that the applicant inability to return to work be based on the industrial components. That is not the case here. Applicant has significant non-industrial factors of disability as noted by the various doctors.
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> …
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> In the recent en bane decision, *Grace Nunes v. State Of California, Dept. Of Motor Vehicles, Legally Uninsured; State Compensation Insurance Fund, Adjusting Agency* (ADJ8210063, ADJ8621818) Opinion and Decision After Reconsideration Filed and served on June 22, 2023, the WCAB held as follows:
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> > Accordingly, a vocational report is not substantial evidence if it relies upon facts that are not germane, marshalled in the service of an incorrect legal theory. Examples of reliance on facts that are not germane often fall under the rubric of "vocational apportionment," and include assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions (*Zmek v. State of California, Department of Corrections and Rehabilitation* (December 13, 2019, ADJ8493350) [2019 Cal. Wrk. Comp. P.D. LEXIS 552]), or was able to adequately perform their job (Lindh, supra, at p. 1194), or suffered no wage loss prior to the current industrial injury (*Borman, supra*, at p. 1141).
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> Here, the physicians provide apportionment which the WCJ accepts as valid and relevant to applicant's inability to participate in vocational training.
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> (Opinion on Decision, at p. 10.)

The WCJ is thus applying the holdings found in *Nunes I* & *II* to the reporting of Mr. Reyes, leading to the conclusion that the vocational expert's reporting failed to properly account for the valid medical apportionment identified by the evaluating physicians. (*Nunes I, supra*, 88 Cal.Comp.Cases at pp. 743-744.) Following our review of the vocational evidence, we agree with the WCJ's assessment that the reporting does not presently constitute substantial vocational evidence. (Report, at p. 10.)

However, we also observe that reports authored by Mr. Reyes on November 19, 2021 (Exhibit I) and November 30, 2022 (Exhibit O) issued prior to our June 22, 2023 decision in *Nunes I*. Additionally, discovery closed in the instant matter on April 4, 2023, prior to the issuance of our en banc opinions in *Nunes I & II*. (Minutes of Hearing, April 4, 2023.)

The WCJ's Report acknowledges the vocational reporting antedates *Nunes I & II*, but that applicant failed to request that the record be supplemented thereafter. (Report, at pp. 4-5.) The

Report also notes that the parties were allowed to brief the issues raised in *Nunes I & II* prior to final submission of the matter for decision. (*Id.* at p. 5.)

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*.)

Here, we believe a final determination with respect to applicant's levels of permanent disability and nonindustrial apportionment must be supported by substantial evidence in light of a review of the entire record. (*Lamb, supra,* 11 Cal.3d at p. 281.) Accordingly, and following our independent review of the record occasioned by applicant's Petition, we conclude 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 full and complete basis upon which to adjudicate the issues of permanent disability and apportionment. Additionally, while we acknowledge that the parties were allowed to brief the holdings in *Nunes I & II* prior to submission for decision, we are not persuaded that offering argument after the close of discovery is sufficient to satisfy principles of due process.

This is especially true in light of the fact that the guidance provided in *Nunes I & II* may have specific application to the vocational reporting in this matter, and because our discussion and disapproval of "vocational apportionment" transpired only after the vocational reporting was adduced and discovery closed. (Lab. Code, § 5502(d).)

Accordingly, we will grant applicant's Petition, rescind the January 17, 2024 F&A, and return this matter to the trial level for development of the record to include supplemental medical and/or vocational reporting, 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 [78 Cal.Comp.Cases 751]; *City of Petaluma v. Workers' Comp. Appeals. Bd.* (*Lindh*) (2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869].)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of January 17, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of January 17, 2024 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 9, 2024

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

ILENE GELFAND
LAW OFFICES OF WILLIAM J. TOPPI
BRADFORD & BARTHEL

SAR/abs

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