WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRAULIO ESPINOZA, ***Applicant***

vs.

STANDARD DRYWALL, INC.;
ZURICH NORTH AMERICAN INSURANCE/AMERICAN ZURICH INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ10133424
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the March 17, 2025 Findings, Award, Order issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained injury to his left ankle, lumbar spine, right hip and psyche as a compensable consequence arising out of and in the course of his employment; that applicant sustained injury as a compensable consequence to the right hip based on the report of agreed medical evaluator (AME) William Campbell, D.O., dated July 22, 2020; that based on Dr. Campbell's opinion, before adjustment for age and occupation, there is 20% WPI to the lower left extremity, 9% WPI to the lower left extremity due to scarring and tenderness, 8% WPI for the lumbar spine, and 3% WPI for the right hip; that the record requires further development of the record on whether applicant is entitled to a rating for psychiatric injury; and that the vocational reporting by Diaz and Company dated January 12, 2024 (Exhibit 3) does NOT rebut the standard ratings under the AMA Guides, 5th Edition and the Permanent Disability Ratings Schedule (AMA Guides). The WCJ deferred all other issues.

Applicant contends that WCJ erred in failing to find applicant permanently totally disabled arguing that his vocational evidence rebutted the standard rating under the AMA Guides.

We did not receive an answer. The WCJ issued a Recommendations on Petition for Reconsideration recommending that we deny reconsideration.

We have considered the Petition for Reconsideration, the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Preliminarily, we note that former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
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> (b)
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> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on April 28, 2025 and 60 days from the date of transmission is June 27, 2025. This decision is issued by or on June 27, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

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

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 28, 2025, and the case was transmitted to the Appeals Board on April 28, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 28, 2025.

II.

The WCJ stated following in the Report:

II. FACTS

> On 07-23-2015, Petitioner/Applicant Braulio Espinoza was injured when he was working as a wallboard laborer for employer/defendant Standard Drywall, insured by defendant Zurich. Applicant testified at trial and recounted that he was injured pushing a cart with piles of sheet rocks on it. (Minutes of Hearing/Summary of Evidence of 01-27-2025, hereinafter "MOH/SOE," at p. 7/lines 16-21.) Since the supply elevator was not working, Applicant and his partner had to hand carry the sheet rock. (Id.) Someone put an electrical cord by his cart, and when they moved the cart, it fell down, and the pile of sheet rock crushed his left leg against a wall. (Id.)
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> Applicant could not continue to work after the accident. His leg did not heal well after the crush injury: on 09-16-2015, Dr. Douglas Chin performed emergency debridement of muscle, fascia, skin, and subcutaneous tissues of the lower left leg. On 11-21-2017, Applicant underwent left ankle arthroscopy with debridement and decompression of anterior impingement. left ankle open posterior tibial tendon repair, and left ankle open posterior tibial tenosynovectomy by Dr. Paul Huges. Applicant has post-surgery physical therapy and treatment, however, problems with the left ankle and leg persisted including pain and swelling, and he developed gait derangement which negatively affected his back. He now uses a cane.
>
> Applicant has a long history of treatment for this injury, which occurred almost a decade ago. He has been prescribed various pain medications including Norco, Lyrica, venlafaxine (an antidepressant), and Cymbalta. He was referred to a psychiatric consultation in 2017 and the record shows problems with sleep. He has

been able to perform meaningful work since the injury. At the time of trial on 01-31-2025, applicant testified competently via video on Court Call because he had recently moved to Labadie, Missouri, to his girlfriend's house where he planned to stay for a while, but he still maintains his official residence in Oakland, at his mother's home.

In a report of 01-19-2016, panel Qualified Medical Evaluator (QME) Robert A. Harvey, M.D. provides a rating for scarring of 7% WPI. (Ex. 9 at 7.) Dr. Harvey provides recommendations for physical therapy and is confident that this would have "a lot to offer as far as improving function of the ankle and knee" and treatment of the skin would also help. (Ex. 9 at 6.) Dr. Harvey does not offer work restrictions or preclusions.

The orthopedic AME in this case is Dr. William Campbell and Applicant contends that the permanent and stationary date according to Dr. Campbell is 10-30-2018. However, Applicant was reevaluated as he complained that his condition had worsened: Applicant's leg and ankle were still painful and he reported swelling, and he developed issues with his low back and hip. One of the issues was injury to the right hip and AME Dr. Campbell supports injury to the right hip.

It is undisputed that based on Dr. Campbell, there is a 20% WPI rating to the lower left extremity based on functional limitations; 9% WPI to the lower left extremity due to scarring and tenderness; 8% WPI for the lumbar spine; and 3% WPI for the right hip. (Ex. 12 at 28-29.) There is no apportionment. (Id. at 30-31.) In the latest AME report of 07-10-2024, Applicant's functional limitations by the AME are no lifting, pushing, or pulling more than 15 pounds, sit/stand at will, with no kneeling squatting or climbing and use of a cane. (Id., at 28.) These are the same work restrictions dating back to the AME report of 07-22-2020. (Ex. 6 at 14.)

Applicant also obtained a QME for psychiatric injury, Dr. Roy Curry. Dr. Curry found that Applicant suffers from anxiety disorder and dysthymia predominantly attributable to his injury. However, causation was at issue as it appears that at the time of the injury, Applicant had worked for the employer for less than six months, one of the requirements for compensability under the Labor Code. Dr. Curry discussed exceptions to the six-month rule, including whether the injury could be regarded as sudden and violent or whether the prolonged nature and course of the claim should render it compensable. By all accounts, Dr. Curry stated that Applicant was cooperative and friendly but frustrated and, though he was not focused in school and did not graduate from high school, Applicant has a good family support system and has worked in his father's businesses. (Ex. 8 at 49-50.)

Dr. Curry found that Applicant probably had no period of temporary disability attributed to his psychiatric condition and provided a WPI rating of 14% less 10% apportionment to non-industrial factors. (Ex. 8 at 52.) The 10% apportionment of the rating was to "longstanding, preexisting personality disorder with some degree of emotional instability" and Dr. Curry recounts Applicant's 2021 tragic and sudden loss of his son at age 26, who was born with spins bifida and who was disabled during his lifetime. (Ex. 8 at 51.)

With regard to psychological treatment, Dr. Curry notes that Applicant has not had treatment, and the reporting supports only a precautionary medical award because Applicant "is not particularly interested in psychotherapy" has tried at least two antidepressants without benefit and at the time of the 2022 evaluation, Applicant was "not using psychotropic medication" but "interested in wanting to settle his case and move forward." (Ex. 8 at 53.)

There are no specific work preclusions from Dr. Curry, but the QME describes Applicant's current ability to function in the 2022 report as follows:

> "He can stand for an hour then his left ankle begins swelling and sometimes sitting after an hour or so if the left ankle is painful. If he is going to take a walk for any distance, he wears an ankle brace. When he sits, he often elevates his leg after an hour because of pain increases. His sleep has improved. He is sleeping through the night.
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> "However, the Epworth showed some degree of sleepiness. The applicant would like to settle his case and move on, perhaps even to Missouri. He describes primary pain in the left ankle some degree in his low back and his right hip, and occasional pain in his right leg from favoring his left leg…
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> "…He did not describe right ankle pain as a problem in the interview. He can take care of himself does some grocery shopping interacts with others, but has some difficulties with prolonged attention and concentration, feels worthless and useless and has periodic mood swings." (Id.)

With regard to activities, applicant plays games online with friends and watches TV but reports that he "can focus and concentrate for a short period of time and then tends to drift off" which he it attributed to pain. (Ex. 8 at 52-53.)

Dr. Curry affirms that Applicant's only medication in 2022 are Gabapentin and naproxen which are taken as needed, and as indicated in the records by Dr. Curry's records review, are *not* taken every day. (Ex. 8 at 50-51.)

Dr. Curry issued a second report dated 06-19-2023, admitted as exhibit 11. Therein, the QME reviewed additional records, including the functional capacity evaluation of 12-12-2022, which is exhibit 2, and surveillance video taken in 2021. (Ex. 11 at 9-10.) Regarding the surveillance, Dr. Curry noted Applicant was smiling and happy and "One would not consider him to be depressed." (Id. at 10.) Dr. Curry describes Applicant in the surveillance film as "a busy man doing tasks mostly around the house, around the yard and with his pets, but he has limitations and restrictions and pain, and an antalgic gait." (Id. at 11.) Dr. Curry reports new activity including recycling for extra money and the QME states that there are new right shoulder complaints, but the right shoulder is not part of this claim. (Id. at 11.) Though Applicant has considered returning to school, he "was not motivated and has not had psychiatric treatment." (Id.) Dr. Curry did not change his opinion on the disability rating or apportionment.

As mentioned above, Applicant also had a functional capacity evaluation by Rachel Feinberg of the Feinberg Medical Group on 12-12-2022, which was admitted as Exhibit 2. The conclusions are based on Applicant's subjective report and testing. Applicant was observed to exhibit full levels of effort but expressed a fear of further injury and fear of increased pain. (Ex. 2 at 2.) Regarding lifting, Applicant's ability was 10 pounds on an occasional basis but guarded movement from waist to shoulder level and from the floor "limit his safe lifting ability" and use of a cane precludes

from performing a double hand carry, so the report appears to endorse only infrequent pushing and pulling activity. (Ex. 2 at 2, 4.) With regard to sitting, Applicant is limited to 30 minutes followed by a 10-minute stand/walk period for a total of no more than 6 hours. (Ex. 2 at 3, 4.) Regarding standing, Applicant is limited to up to 20 minutes at a time followed by a 10-minute sitting period. (Ex. 2 at 2, 3.) Applicant can grasp and grip all day with his right hand and up to frequently with his left hand. (Ex. 2 at 2, 3.)

Regarding Activities of Daily Living, it is reported that the Applicant performs light cleaning of his room, laundry, and is able to do some shopping. (Ex. 2 at 19.) He walks his dog and walks 6 stairs 5 to 6 times a day to go from his studio into the main house. (Ex. 2 at 19.) Applicant self-reports that he has pain on a consistent basis and reports that the "Level of Pain that I could have and still work: 4" on a scale of 10 where 0 represents no pain and 10 represents maximal or emergency pain level. (Ex. 2 at 19-20.) The report states that Applicant has "a high fear of movement/reinjury." (Ex. 2 at 20.) The conclusion is that applicant is moderately disabled, or experiences more pain and problems with sitting, lifting, and standing; travel and social life are more difficult, but "personal care, sexual activity and sleeping are not grossly affected, and the back condition can usually be managed by conservative means." (Ex. 2 at 20.) As far as the lower extremities are concerned, Applicant is rated positive for pain, symptoms, negative impact on activities of daily living and there is a severe impact on his quality of life. (Ex. 2 at 21.)

Applicant also retained a vocational expert, Frank Diaz. Applicant contends that he should be awarded 100% permanent disability based on Mr. Diaz's report. Mr. Diaz concludes that as the result of the vocational evaluation of Applicant and based on a "LeBoeuf Determination" in this case, "a permanent disability rating of less than one hundred percent (100%) is not accurate." (Ex. 3 at 35.) Specifically,

> "When considering Mr. Espinoza's individualized work history, the results of the transferrable skills analysis, the medical opinions, impairments, and the synergetic (additive) effect of the labor disabling functional limitations as set forth by Drs. Campbell, Currey, Harvey, Hughes, and Mitchell, accommodations may be available to Mr. Espinoza in the competitive open labor market, and Mr. Espinoza's amenableness to vocational rehabilitation, I come to the vocational opinion that Mr. Espinoza, in all vocational probability, has incurred a one hundred percent (100%) loss of labor market access." (Ex. 3 at 35.)

Applicant participated in vocational testing administered by Diaz consultants. Applicant's results from the Raven Standard Progressive Matrices (Raven) consisted of a raw score of 38 which, according to Mr. Diaz, ranks applicant in the 65th percentile indicating that Applicant is "intellectually average." (Ex. 3 at 11.)

Applicant also completed the Career Ability Placement Survey (CAPS) in English. (Ex. 3 at 10.) Applicant scored average in mechanical reasoning, numerical ability, word knowledge, and perceptual speed and accuracy. (Ex. 3 at 11.) Applicant scored "a little below average" in spatial relations, language usage, and manual

speed and dexterity. (Ex. 3 at 11.) Applicant scored low in verbal reasoning. (Ex. 3 at 11.) The vocational expert concluded:

> "Mr. Espinoza's strongest areas were Science Skilled, Technology Skilled, Consumer Economica, Outdoor, Business Skilled, Clerical, Arts Skilled and Service Skilled. "Based upon the results of vocational testing, in all vocational probability, Mr. Espinoza would learn well in either a hands-on learning situation or a formal training situation. However the results of vocational testing do not take into account the effects that pain and medication may have upon his abilities to learn. If requested I can provide detailed information regarding the norms utilized and background information regarding vocational testing administered to Mr. Espinoza." (Ex. 3 at 11.)

Mr. Diaz states that the Applicant knows how to operate a computer and knows the home keys of a computer keyboard, can operate a smartphone, can use search engines, chat groups, electronic mail and operates his home computer for up to two hours, one or two time per week. (Ex. 3 at 9.) At trial, Applicant testified via smartphone and had no technical difficulties testifying without any assistance. Mr. Diaz opines that Applicant has difficulty typing for more than five minutes due to the left wrist and hand pain. (Ex. 3 at 9.) However, this is not documented in the medical record or by the functional capacity evaluator or elsewhere. Rather, the record shows that Applicant can operate a computer and smartphone and plays online video games regularly. Regardless, the vocational expert places conditions on the results of testing, namely "the effects that pain and medication may have upon his abilities to learn." (Ex. 3 at 11.)

The vocational expert also analyzed AME Dr. Campbell's report of 07-22-2020, stating:

> "Mr. Espinoza's work preclusions on page fourteen (14) of his July 22, 2020 report:
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> > "Permanent work preclusions remain indicated. I continue to feel that patient is not able to return to his usual and customary work as a scrapper with Standard Drywall.
> >
> > "In my opinion, work restrictions should continue to be provided as follows: No lifting, pushing or pulling more than 15 pounds, sit/stand at will, no kneeling, squatting or climbing. He will require use of a cane.
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> "Given the work restrictions as set for by Dr. Campbell Mr. Espinoza would be unable to perform work at a Light Level of physical functioning as, according to the Dictionary of Occupational Titles (DOT), Light work requires 'Exerting up to 20 pounds of force occasionally' and 'should be rated Light Work: (1) when it requires walking or standing to a significant degree…

> "As such, Mr. Espinoza's relegation to sedentary work which in and of itself is labor disabling as Mr. Espinoza can no longer perform work occurring as a Heavy, Medium, or Light level of physical functioning as defined by the DOT." (Ex. 3 at 18-19.)

Based on the AME, Mr. Diaz's conclusion is that Applicant is limited to sedentary work. Mr. Diaz refers to the DOT definition of sedentary work as exerting up to 10 pounds of force occasionally and/or negligible force frequently to lift, carry, push, pull or otherwise move objects including the human body and such work involves sitting most of the time and will require only occasional walking or standing. (Ex. 3 at 18.) In the Findings and Award, I agreed with the conclusion that Applicant can perform only sedentary work and that he can no longer perform laborer duties. However, the totality of the evidence did not render Applicant unable to participate in vocational rehabilitation nor did it support the contention that he otherwise is precluded from the open labor market.

III. DISCUSSION

The scheduled rating derived under the AMA Guides, 5th Edition and the Permanent Disability Rating Schedule (PDRS) is considered prima facie evidence of disability according to Labor Code section 4660.1(d). However, it is well established that an injured worker may rebut the PDRS through vocational evidence showing that the injured worker is not amenable to vocational rehabilitation. Contra Costa Co. v. WCAB (Dahl)(2013) 240 C.A. 4th 746; 80 Cal.Comp.Cases 1119 at 1127; Ogilvie v. WCAB (2011)197 C.A.4th 262, 76 Cal.Comp.Cases 624; and LeBoeuf v. WCAB (1983) 34 Cal.3d 234, 48 Cal.Comp.Cases 587.

Petitioner highlights caselaw for the proposition that the permanent disability rating should reflect as accurately as possible an injured worker's diminished ability to compete in the open labor market and may include vocational and labor market evidence describing the injured worker's diminished future earnings capacity and ability to compete in the labor market according to Michael Thomas v. Peter Kiewit Son's, Inc., Sedgwick Claims Management Services (ADJ9229553) filed march 23, 2021, First Appellate District, Division One (A 162581) (writ denied) relying on Dahl, supra, 240 C.A. 4th 746; 80 Cal.Comp.Cases 1119. In accord with the AME preclusions, vocational expert Mr. Diaz opines that applicant is at best relegated to sedentary work. (Ex. 3 at 14.) My opinion is consistent with this conclusion. In consideration of Applicant's prior work history as a laborer, driver, server, unloader, and drywall helper, and because he has no high school diploma, Applicant has experienced the loss of his usual labor market. But vocational expert Mr. Diaz further opines that due to the myriad of accommodations and synergy of the disabling functional limitations set forth by the physicians, applicant is unable to return to the open labor market.

The Petition for Reconsideration highlights specific issues which are now addressed. With regard to medication usage, the petition asserts that pain is a major factor and well documented in the medical records. Applicant relies on testimony that on a typical day, his pain starts at 6 or 7 on a scale of 10, with 10 being unbearable pain, and currently his pain is 7, and on average his pain is level 6.

(MOH/SOE 01-27-2025 at 8/lines 6-9; Trial Transcript, EAMS Doc. Id. No. 79042176, p. 8/lines 10-22.) Though there is no doubt that Applicant's leg condition causes constant pain, neither the AME, the psychiatry QME, nor the functional capacity evaluator opine that Applicant's pain is completely labor disabling or the medication usage would interfere with work. To the contrary, the AME and functional capacity evaluator offer work limitations, not preclusions. Dr. Curry notes some difficulties with prolonged attention and concentration and a tendency to "drift off" during video games due to the pain, but these conditions are not in and of themselves labor disabling. Dr. Curry does not suggest that these complaints are labor disabling.

Though Applicant in the petition argues that he had tried but could not tolerate more powerful opioid and pain medication, trial testimony and the QME by Dr. Curry affirms that the only medications currently taken are Gabapentin and naproxen which are taken as needed and are not taken every day. (Ex. 8 at 50-51.) The undersigned takes umbrage at the part of petition criticizing the undersigned for inferring that it is Applicant's own fault for his own pain because of his lack of medication usage. The fact that Applicant suffered greatly from the initial injury and incurred several surgeries is duly noted. The medical record only shows that he has tried narcotic and various medication in the past and that Applicant did not like the side effects, so he takes Gabapentin and naproxen as needed to endure some pain.

Turning to the functional capacity evaluation, the pain complaints in that report differ from testimony at trial. Applicant was tested physically for the evaluation, and he reported a pain level of 4, with the worst pain peaking at 7 and the best at 3, concluding that he could still perform work while experiencing a pain level of 4 of 10. (Ex. 2 at 19-20.) His average pain level has increased now to 6 or 7 when he wakes in the morning and gets worse when he does activities. (MOH/SOE at 8-9.) On cross-examination, Applicant was asked by Dr. Curry reported the pain level as 3 versus level 7 now and Applicant has no explanation as this increase at the time of trial. (Id. at 10.)

At the functional capacity evaluation, Applicant reported taking his typical pain measures which "may have included gabapentin, naproxen and/or Cymbalta" on the day of physical testing. (Ex. 2 at 8.) He performed tests as requested. The functional capacity evaluator also noted to manage his pain, Applicant uses avoidance and smokes marijuana. (Id. at 19.) Applicant's cautiousness in avoiding activity due to pain is supported by the Tampa Scale Kinesiophobia (TSK) results reported in the functional capacity evaluation, with the score of 54 indicating a high fear of movement/re-injury. (Id. at 20.) The functional capacity testing describes Applicant as having a "moderate" disability meaning there are problems with sitting, lifting, standing, and moderate disability may result in time off work, but this degree of pain does not in and of itself preclude work. (Id.)

The petition at page 10 asserts that pain and symptoms have a negative impact on Applicant's activities of daily living and that there is a severe impact on his quality of life and Applicant testified that "everything he does increases his pain level." (MOH/SOE at 10.) The functional capacity evaluator placed Applicant in the "moderate" disability classification, and for this classification personal care, sexual activity, and sleeping are not grossly affected. (Id.) Applicant testified that the only time he does not feel pain is when he is sleeping. (MOH/SOE at 11.) At the time of the functional capacity evaluation, Applicant was living alone in a studio in the back of his mother's house. (Id. at 2.) In the latest psychological report from 2023, QME

Dr. Curry reports that on surveillance film, Applicant appears "a busy man" doing tasks around the house, around the yard, and tending to his pets, despite his altered gate and restrictions. (Ex. 11 at 11.) Dr. Curry and the functional capacity reporting show that Applicant's activities of daily living are not an impediment to work, that he is coping and functioning to take care of himself and his pets, and he is able to maintain positive, supportive relationships with his girlfriend, friends, and family.

The vocational report does not adequately address these nuances; instead, the vocational report only concludes that due to the synergistic effects of totality of the medical reports reviewed, Applicant would require a "myriad of accommodations to return to work" in the competitive labor market. The vocational expert's opinion is conclusory and cannot be fully reconciled with the details of the other reports.

The petition further contends that applicant is not amenable to rehabilitation. Dr. Curry's report of 05-19-2022 reports that Applicant had decreased attention, concentration, memory, and self-confidence. (Ex. 8 at 52.) Applicant contends that the vocational expert opines that these "diagnosed industrial conditions" would create a significant difficulty performing work in the open labor market. However, Applicant can play games online, operate a computer, and cell phone. Dr. Curry documented aside from trying antidepressant medication, that there has been no psychotherapy treatment in this case, and Applicant declines to undertake any such treatment. (Ex. 8 at 53.) The psychological deficits are not labor disabling. Psychological or psychiatric treatment may also help with any or all symptoms and improve his attention, concentration, memory, and self-confidence. Moreover, Dr. Curry finds 10% apportionment of Applicant's disability to non-industrial family stressors including but not limited to the death of his son. Finally, the most recent report, Dr. Curry observes Applicant being productive and not appearing as a depressed person on surveillance film. Thus, the record contains a myriad of evidence inconsistent with Mr. Diaz's conclusions that Applicant is not amenable to vocational rehabilitation and/or cannot be reasonably accommodated.

(Report, at pp. 1-14.)

III.

We highlight the following legal principles that may be relevant to our review of this matter:

Section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides, as applied by the Permanent Disability Rating Schedule (PDRS) in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680] (*Fitzpatrick*); *Milpitas Unified School Dist.*

v. Workers' Comp. Appeals Bd. (Guzman) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Guzman*).)

However, the scheduled rating is not absolute. (*Fitzpatrick, supra*, at pp. 619-620.) 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. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119] (*Dahl*).) In analyzing the issue of whether and how the PDRS could be rebutted, the Court of Appeal has observed:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when 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. This is the rule expressed in LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 234 [193 Cal.Rptr. 547, 666 P.2d 989]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id*. at pp. 237-238.) Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating."
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> (*Ogilvie, supra*, at p. 1274.)

Thus, "an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.' (*Ogilvie, supra*, at p. 1277.)

Additionally, and if applicant's psychological injury is industrial, the medical record should delineate what portion of applicant's psychological permanent disability may be compensable pursuant to section 4660.1.

Section 4660.1(c) states:

> (c) (1) Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric

> disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall 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.
>
> (2) An increased impairment rating for psychiatric disorder shall not be subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:
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> > (A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.
> >
> > (B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.
>
> (Lab. Code, § 4660.1(c).)

As to whether applicant's psychological permanent disability is compensable, again, the evaluator needs to break down the causes of such disability. Section 4660.1(c) does not preclude increases in impairment ratings when the psychiatric disability is directly caused by the industrial injury. (See *Ricablanca v. California Dep't of Corrections & Rehabilitation*, 2017 Cal. Wrk. Comp. P.D. LEXIS 147; *City of Los Angeles v. Workers' Comp. Appeals Bd. (Montenegro)* (2016), 81 Cal.Comp.Cases 611 (writ den.) [holding that impairment caused by sexual dysfunction arising directly from the industrial injury is not precluded under section 4660.1(c)] See also, *Russell Madson v. Michael J. Cavaletto Ranches*, (ADJ9914916) (2017), 2017 Cal. Wrk. Comp. P.D. LEXIS 95 [holding that impairment to the psyche caused directly by the events of employment is compensable].)

Moreover, it is well established that decisions by the Appeals Board 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].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Based on our review, we are not persuaded that there is substantial evidence to support the WCJ's decision without additional development of the record. In addition, because a strict rating must be determined before the issue of rebuttal can be addressed, and given the deferral of the issue of rating for psychiatric injury, the WCJ's finding that applicant's vocational reporting does not rebut the standard rating under the AMA Guides appears premature.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57

Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp*. *Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp*. *Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

V.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. ***While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to*** WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSE H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 27, 2025

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

BRAULIO ESPINOZA
LAW OFFICES OF ELIZABETH F. MCDONALD
STOCKWELL, HARRIS, WOOLVERTON & FOX

PAG/bp

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