WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AMBER BILLOW, *Applicant*

vs.

THE BOYS AND GIRLS AID SOCIETY OF LOS ANGELES COUNTY; UNITED STATES FIRE INSURANCE COMPANY, administered by CRUM AND FORSTER INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ6508173
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings and Award (F&A) issued on November 22, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that, while employed as a wraparound counselor for defendant, applicant sustained injury arising out of and in the course of her employment on August 23, 2007, to her lungs, Metabolic Equivalents (METs), upper digestive system (in the form of gastroesophageal reflux disease (GERD)), psyche and in the form of a sleep disorder; that 60% of the permanent disability to the body parts of psyche and arousal disorder (sleep) and that 100% of the permanent disability to the body parts/conditions of upper digestive system (GERD), METS and respiratory disorder were caused by applicant's industrial injury; that applicant was entitled to an increased permanent disability rate pursuant to the provisions of Labor Code Section 4658(d)(2); and that based on the vocational evidence, applicant's injury caused 100% permanent and total disability.

Defendant contends that the WCJ erred in applying a 15% increase to the permanent disability indemnity under Labor Code section 4658(d)(2).[2] It contends that the opinions of Qualified Medical Evaluator (QME) Bruce Gillis, M.D., were not substantial evidence because Dr. Gillis rated

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[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

applicant's permanent disability by analogy under *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*); combined applicant's whole person impairments (WPIs) by addition under *Athens Administrators v. Workers' Comp. Appeals. Bd*. (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied) (*Kite*) rather than using the combined values chart (CVC) in the Permanent Disability Rating Schedule (PDRS); and found no apportionment of applicant's pulmonary disability to her nonindustrial fibromyalgia. In addition, defendant contends that the WCJ erred in relying on the opinion of vocational expert (VE) Paul Broadus, M.A., because Mr. Broadus' opinion that applicant could not compete in the open labor market relied on nonindustrial factors. Finally, defendant contends that the WCJ erred in finding that "METs" was an industrially injured body part separate and distinct from the lungs and that injury in the form of "METs" caused ratable permanent disability.

We have received an Answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant reconsideration to amend the finding as to the 15% increase in permanent disability under section 4658(d), but that we otherwise deny the Petition.

We have considered the allegations in applicant's Petition and defendant's Answer, and the contents of the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&A, and substitute a new F&A that finds that applicant sustained injury to her lungs, upper digestive system (in the form of gastroesophageal reflux disease (GERD), psyche and in the form of a sleep disorder, but not in the form of METs because it is a measure of functional limitation and not a separate body part; and to defer the issue of permanent disability, apportionment and attorney fees, and the issue of whether the increase under section 4658(d) applies.

BACKGROUND

Applicant, while employed on August 23, 2007, as a wraparound counselor, sustained an industrial injury to her lungs and psyche and claimed to have sustained industrial injury to her METs, upper digestive system (in the form of GERD), and in the form of a sleep disorder, due to toxic exposure.

The parties utilized QMEs Dr. Gillis and Robert Faguet, M.D., and each authored multiple medical reports in this case, (Def. Exs. A-R; W-II) including depositions of QMEs Dr. Gillis and

Dr. Faguet. (Def. Exs. S-V; HH.) Applicant submitted VE reports from Mr. Broadus (App. Exs. 1-2), and defendant submitted VE reports from Kelly Winn, M.S. (Def. Exs. JJ-KK).

On August 12, 2021, the parties proceeded to trial. Among the issues submitted were parts of body injured, permanent disability and apportionment.

On April 11, 2022, the WCJ issued his F&A, awarding applicant 100% permanent disability based on the QME reports of Dr. Gillis and Dr. Faguet as well as the reports of VE Mr. Broadus.

It is from this F&A that defendant seeks reconsideration.

DISCUSSION

I. PERMANENT DISABILITY

It is axiomatic that substantial evidence must support the decisions by the Appeals Board. (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].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

In *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680] (*Fitzpatrick)*, the court found that impairments "are generally combined" using the CVC, but the "scheduled rating [under the CVC] is not absolute" and other methodologies may be used to calculate permanent disability. (*Id.* pp. 613-614.)

For example, in *Athens Administrators v. Workers' Comp. Appeals. Bd*. (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied) (*Kite*), the Appeals Board concluded that impairments resulting from a cumulative injury to the bilateral hips may be added where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating

of the level of disability than the rating that results from using the CVC. (See also *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ denied) (requires following a physician's opinion as to the most accurate rating method if they provide a reasonably articulated medical basis for doing so and does not require use of the term "synergistic").)

In *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc) (*Vigil*), the Appeals Board held that an injured employee can rebut the CVC in the PDRS and add impairments where they can establish the impact of each impairment on the activities of daily living (ADLs). In addition, they must show either (a) there is no overlap between the effects on ADLs between the body parts rated, or (b) there is overlap but the overlap increases or amplifies the impact on the overlapping ADLs. The Appeals Board explained that medical expertise is required:

> In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the *medical evidence* demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.

(*Id.* at p. 692, italics added.)

Our en banc decision in *Vigil* issued on June 10, 2024, after the WCJ's decision issued on November 22, 2021, and is mandatory authority on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

In addition, while the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides) function as advisory frameworks, they are not strict texts subject to rote or literal application. Instead, an evaluating physician may use their experience and expertise to interpret and apply any portion of the entire AMA Guides. Pursuant to *Almaraz/Guzman II* 74 Cal.Comp.Cases 1084, the Appeals Board held that:

> [W]hile the AMA Guides often sets forth an analytical framework and methods for a physician in assessing WPI, the Guides do not relegate a physician to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgment. Instead, the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI.

(*Id.* at pp. 1103-1104; affirmed by *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Guzman III*).)

The overarching goal of rating permanent impairment is to achieve accuracy (*Guzman III*, *supra*, 187 Cal.App.4th at p. 822), and the standard for calculating WPI is to determine the most accurate reflection of impairment as measured by any chart, table, or methodology contained within the entire AMA Guides. Thus, proper application of *Almaraz/Guzman II* requires a physician to provide a strict AMA Guides rating, explain why that strict rating does not accurately reflect applicant's functional limitations, and, with reasoned explanation, support an alternative rating derived from within the AMA Guides that more accurately reflects applicant's level of disability. (*Id.* at p. 828-829; *Leiva v. Webcor Construction* [2025 Cal. Wrk. Comp. P.D. LEXIS 390, *29-30]; *Linstad v. City of Richmond* [2025 Cal. Wrk. Comp. P.D. LEXIS 5, *9]; *Martin v. Cox Castle & Nicholson, LLP* [2024 Cal. Wrk. Comp. P.D. LEXIS 212, *17]; *Kelley v. Lawrence Berkeley National Laboratory* [2024 Cal. Wrk. Comp. P.D. LEXIS 115, *11].)[3]

Finally, as noted above, the court in *Fitzpatrick* also acknowledged that it is permissible to depart from the scheduled rating based on a VE opinion that an employee has a greater loss of future earning capacity than reflected in a scheduled rating. (*Fitzpatrick*, *supra*, 27 Cal.App.5th at pp. 613-614 and 618-620; see *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746, 758 [80 Cal.Comp.Cases 1119]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587, 594] (*LeBoeuf*).)

Here, in QME Dr. Gillis's report dated August 29, 2008, based on his evaluation of applicant, he concluded that applicant suffered inhalation exposure at work on August 23, 2007, resulting in a chronic, residual cough, followed by severe headaches, fatigue, nausea, chills and dizziness. (Def. Ex. R at pp. 1; 2-3.) QME Dr. Gillis observed that, after a methacholine challenge analysis, applicant had an abnormally positive response demonstrating a reduced oxygen uptake capacity. He diagnosed applicant with hypersensitive airway disease, resulting in 26% WPI based on the VO_2

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

max test result of 17.2, translating to Class III, Table 5-12 on page 107 of the AMA Guides with no apportionment to non-industrial factors. (*Id.* at pp. 8; 11.)

In QME Dr. Gillis's supplemental report dated February 22, 2013, he noted the VO_2 max test results on September 17, 2009 improved to 18.8, but he did not change his opinion as to applicant's WPI. (Def. Ex. M. at p. 2.)

In his supplemental report dated January 30, 2014, after further testing, Dr. Gillis diagnosed applicant with non-industrial fibromyalgia predominantly causing her chronic fatigue, depression, insomnia and headaches. (Def. Ex. L at p. 3.) He concluded that applicant's non-industrial fibromyalgia caused 25% WPI based on Class II, Table 9-3 on page 200 of the AMA Guides. (*Id.* at p. 8.)

In QME Dr. Gillis's supplemental report dated August 18, 2014, he noted the VO_2 max test results on September 17, 2009 improved to 17.9, but he did not change his opinion as to applicant's WPI. (Def. Ex. K at pp. 7-8.)

In QME Dr. Gillis's supplemental report dated August 11, 2016, he diagnosed applicant with gastrointestinal abnormalities resulting in 25% WPI based on Class III, Table 6-3 on page 121 due to her detectable abnormalities and psychological problems with no basis for apportionment. (Def. Ex. E at p. 4.)

At his deposition on August 22, 2017, QME Dr. Gillis recommended adding applicant's pulmonary, gastrointestinal and psychiatric impairments rather than utilizing the CVC based on the assumption that her weight gain caused the impairments. (Def. Ex. T at pp. 91:1-13 to 92:1-11.)

In QME Dr. Gillis's supplemental report dated November 17, 2017, he noted the VO_2 max test results on June 18, 2015 improved to 19.3, but dropped to 12.9 due to applicant's morbid obesity requiring a bariatric program to modify her weight. (Def. Ex. D at p. 7.)

In QME Dr. Gillis's supplemental report dated March 14, 2018, he diagnosed applicant with obstructive sleep apnea resulting in 9% WPI based on Class I, Table 13-4, on page 317 of the AMA Guides due to her obesity and post-traumatic stress disorder with 40% apportionment to non-industrial factors. (Def. Ex. C at p. 3.)

At his deposition on September 3, 2019, QME Dr. Gillis endorsed adding applicant's body systems rather than utilizing the CVC, by testifying that they caused a synergistic effect due to their inextricability without overlap. (Def. Ex. LL at pp. 133-25 to 134:1-11.)

At his deposition of September 1, 2020, QME Dr. Gillis testified that with respect to applicant's pulmonary disability of 26% WPI, her VO_2 max test results varied over the years due to

her obesity. (Def. Ex. S at pp. 123:3-25 to 124:1-16.) While this did not change the class rating, assuming applicant's weight exceeded 200 pounds, he would increase her WPI to somewhere between 26 to 38%. (*Id.* at pp. 126:1-25 to 127:1-7.) With respect to applicant's METs, he gave her 74% WPI analogizing it to Class IV, Table 3-6a (Criteria for Rating Permanent Impairment Due to Coronary Heart Disease) on page 36. (*Id.* at p. 127:9-25 to 129:1-3.) He considered this more accurate because her respiratory disorder and reduced METs had limited her from standing, walking and climbing. (*Id.* at pp. 130:7-25 to 131:1-4.) She would also need special air filters and an environment no colder than 72 degrees. (*Id.* at p. 131:7-19.) With respect to apportionment, despite permanent disability for the fibromyalgia, QME Dr. Gillis did not apportion any permanent disability for the pulmonary and gastrointestinal system to non-industrial factors. (*Id.* at pp. 137:3-25 to 138:1-14.)

In QME Dr. Faguet's report dated February 28, 2011, based on his evaluation of applicant, he diagnosed an industrially caused depressive disorder, not otherwise specified resulting in a Global Assessment of Functioning of 62, resulting in 12% WPI. (Def. Ex. HH at p. 13.) In his supplemental report dated March 25, 2019, QME Dr. Faguet apportioned 40% of applicant's psychiatric permanent disability to "family problems." (Def. Ex. W at p. 9.)

Finally, in his VE report dated October 21, 2020, following his evaluation of applicant, VE Mr. Broadus wrote that in a given week, applicant has two good days per week where she is able to grocery shop, run errands and walk her dog. (App. Ex. 1 at p. 4.) She is non-productive the other days. (*Ibid.*) She has difficulty standing after five minutes and suffers from chronic insomnia. (*Ibid*.) She has difficulty cooking due to standing, does not do many household chores and is unable to study for more an hour per day due to fluctuating concentration. (*Id.* at p. 5.) VE Mr. Broadus concluded that applicant "no longer has the ability to return to work in the open labor market . . . [and] is not able to compete, or to be retained for any suitable gainful employment, and is not amenable to vocational rehabilitation." (*Id.* at p. 23.) With respect to apportionment, VE Mr. Broadus wrote the following:

> I am aware that Dr. Fauget has apportioned 40% of her psychiatric impairment to nonindustrial issues; however, even with these she continued to work. Furthermore, based on the reporting and testimony of Dr. Gillis, it is my opinion that she is unemployable due to the internal medicine issues alone. These are 100% industrial. The sleep apnea is apportioned in line with her psychiatric problems and obesity, but even a partial contribution from the industrial portion, in combination with her stamina issues from the respiratory problems, would affect her ability to work. In spite of this non-industrial apportionment, she is not amenable to rehabilitation. As

> discussed above, the fibromyalgia is not industrial, so I have not considered it in the vocational analysis.

(*Ibid.*)

After independently reviewing the record, we conclude that applicant rebutted the PDRS, based on the substantial evidence of QME Dr. Gillis's opinions. QME Dr. Gillis found Table 3-6a (AMA Guides, p. 36) more accurately assessed applicant's pulmonary permanent disability than strict application of Table 15-2 (*Id.* at p. 107), in light of her fluctuating weight, her varied METs results, and their combined effect on her ADLs. In addition, we note that VE Mr. Broadus's opinion regarding applicant's lack of vocational feasibility was based on the substantial medical evidence of QME Dr. Gillis' opinions. Thus, it was persuasive to rebut the PDRS in accordance with *LeBoeuf* given applicant's demonstrably limited ADLs and her unsuitability for gainful employment.

However, QME Dr. Gillis did not provide a complete discussion supporting adding all the body systems pursuant to *Vigil*, leaving his analysis incomplete. Therefore, QME Dr. Gillis's opinion regarding addition of applicant's impairments requires further development to address our holdings in *Vigil*.

"[I]n order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process," the WCJ and the Appeals Board both have a duty to further develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).) Indeed, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases," and is therefore "clearly permitted" to admit evidence even after the discovery cut-off under section 5502(d)(3). (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264]; Cal. Const., art. XIV, § 4 [The system of workers' compensation "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State."].) Pursuant to sections 5701 and 5906, a WCJ or the Appeals Board may not leave undeveloped issues that, through the exercise of its specialized knowledge, recognizes as requiring further evidentiary development. (*Kuykendall, supra*, 79 Cal.App.4th at p. 404.)

We therefore must defer the issue of permanent disability to allow for augmentation of the evidentiary record in accordance with *Vigil* and to address the issues of apportionment discussed in Section II below. Given that we are deferring the issue of permanent disability, the issue of the application of section 4658(d)'s 15% increase in permanent disability indemnity is necessarily deferred, and we need not consider it further at this time.

Finally, with respect to applicant's claim of injury to "METs" as a separately pled body part, we must clarify that "METs" is not a body part. Instead, it is a measure of a person's functional capacity and how much physical activity they can safely perform. One MET represents the energy used at rest. Pulmonary conditions, such as chronic lung disease or reduced lung function, can limit a person's ability to perform higher-energy activities. Lower MET levels indicate greater limitation and reduced capacity for work or daily tasks. MET assessment provides an objective way to evaluate the impact of pulmonary impairments on work-related functioning and disability. (AMA Guides, 5.4f, pp. 101, 601.) Pursuant to the 2005 Schedule and the AMA Guides, impairments used as the basis for permanent disability ratings must be attributable to a specific condition or anatomical region. (*Morales v. Ao-Cal Poly Corp.* [2022 Cal. Wrk. Comp. P.D. LEXIS 9, *5].) As "METs" is neither a disease process nor a body part, it cannot rate as a pulmonary permanent disability separate and distinct from the lungs. We will therefore correct the findings of injury to body parts accordingly.

II. APPORTIONMENT

Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors, to allocate legal responsibility fairly. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 911 [70 Cal.Comp.Cases 787.].) A medical evaluator must parcel out industrial and non-industrial causation of permanent disability. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927 [71 Cal.Comp.Cases 1687].)

Apportionment of permanent disability is "based on causation" and the "employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, §§ 4663(a) and 4664(a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc) (*Escobedo*).) Apportionment now includes pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided

there is substantial evidence establishing that these other factors have caused permanent disability. Pursuant to *Escobedo*, a physician's opinion must constitute reasonable medical probability, must not be speculative, rely on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of its conclusions. (*Id.* at p. 621.) That is, they must explain the "how and why" of their apportionment opinion. (*Ibid*.)

Pursuant to *Benson v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1620 (Appeals Board en banc), a physician must consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or condition. (*Id.* at p. 1622.)

The burden of proof to establish apportionment falls on defendant. (*Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In other words, applicant does not have the burden of disproving apportionment. (*Alcantar v. Martinez* [2025 Cal. Wrk. Comp. P.D. LEXIS 231, *9]; *Moraido v. County of San Diego* [2024 Cal. Wrk. Comp. P.D. LEXIS 375, *13, fn. 3]; *Arias v. William Roofing Co.* [2024 Cal. Wrk. Comp. P.D. LEXIS 29. *5.]; *Matias v. Naturipe Berry Growers* [2024 Cal. Wrk. Comp. P.D. LEXIS 52, *4.].)

With respect to vocational expert evidence, pursuant to *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc) (*Nunes I*), the Appeals Board held as follows:

1. Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."

2. Vocational evidence may be used to address issues relevant to the determination of permanent disability.

3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

(*Id.* at pp. 743-744.)

In addition, "[v]ocational evidence may also be used to parse permanent disability caused by multiple body parts or systems" to determine if applicant's permanent total disability was related to a single body part. (*Id.* at pp. 751-752.)

Here, defendant failed to meet its burden of proof given that QME Dr. Gillis did not find any basis to apportion applicant's permanent disability for her lungs and upper digestive system to

non-industrial factors, including her non-industrial fibromyalgia. As discussed above, defendant cannot shift its burden of proof regarding apportionment to applicant under a theory of lack of substantial medical evidence. However, as we are deferring the issue of permanent disability, we also defer the issue of apportionment.

Accordingly, as our Decision After Reconsideration, we rescind the F&A, and substitute a new F&A that finds that applicant sustained injury to her lungs, upper digestive system (in the form of gastroesophageal reflux disease), psyche and in the form of a sleep disorder, but not in the form of METs and to defer the issues of permanent disability, apportionment and attorney fees and the issue of the application of section 4658(d).

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings & Award dated on November 22, 2021 is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Amber Billow, while employed on August 23, 2007 by defendant Five Acres Boys and Girls Society as a wraparound counselor, Occupational Group Number 110, at Altadena, California, sustained injury arising out of and in the course of employment to her lungs, upper digestive system (in the form of gastroesophageal reflux disease), psyche and in the form of a sleep disorder. The claim of injury to Metabolic Equivalents (METs) is not a separate body part and is not ratable.
2. At the time of the injury, the employer's workers' compensation carrier was United States Fire Insurance Company, administered by Crum & Forster.
3. At the time of the injury, the employee's earnings were $1,153.85 per week, warranting indemnity rates of $769.23 for temporary disability and for permanent disability, $230 if the permanent disability is between 1 percent and 69 percent, $270 if the permanent disability is between 70 percent and 99 percent, and initially $769.23 if the permanent disability is 100 percent. The issue of whether applicant is entitled to a 15% increase under Labor Code section 4658(d) is deferred.
4. Defendant has paid compensation as follows: temporary total disability at $769.23 from August 28, 2007 through May 26, 2008; temporary partial disability at $374.08 per week from May 27, 2008 through October 13, 2008; permanent disability at $230 per week from October 14, 2008 through November 21, 2012.
5. The start date for payment of permanent disability indemnity is May 22, 2008.
6. Applicant is entitled to temporary disability for the period beginning August 28, 2007 to and including May 21, 2008, payable at a rate of $769.23 per week, less credit for time worked, less indemnity paid, less monies paid by Employment Development Department. The issue of whether defendant is entitled to a credit is deferred.
7. The issues of permanent disability and apportionment are deferred.
8. Applicant is entitled to further medical treatment to her lungs, upper digestive

system (in the form of gastroesophageal reflux disease), psyche and in the form of a sleep disorder.

9. The issue of attorney fees is deferred.
10. There is no reasonable basis to strike the reports of QME Bruce Gillis, M.D.

AWARD

AWARD is made in favor of applicant, Amber Bilow, against defendant, United States Fire Insurance Company, administered by Crum & Forster Insurance Company, as follows:

1. Temporary disability in accordance with Finding of Fact 6 above.
2. Further medical treatment in accordance with Finding of Fact 8 above.

ORDER

Defendant's request to strike the reports of QME Bruce Gillis, M.D., is denied.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 16, 2026

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

AMBER BILLOW
BERKOWITZ & COHEN, APC
TOBIN LUCKS, LLP

DLP/md

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